Supreme Court, U.S.
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No. 041257

In The

Supreme Court of the United States

FRANCES D. KETTENBACH,

Petitioner,

v.

RAFAELE LORAINE DEMOULAS, ADMINISTRATRIX OF THE ESTATE OF EVAN G. DEMOULAS AND NEXT FRIEND OF VANESSA EVAN DEMOULAS, DIANA D. MERRIAM, FOTENE J. DEMOULAS, ARTHUR S. DEMOULAS AND EVANTHEA DEMOULAS,

Respondents.

On Petition For A Writ Of Certiorari To The Appeals Court For The Commonwealth Of Massachusetts

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Code of Judicial Conduct adopted by the Supreme Judicial Court of Massachusetts provides, in part: "Disqualification (1) A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (a) the judge has personal bias or prejudice concerning a party or a party's lawyer. . . . " Supreme Judicial Court Rule 3:09, Canon 3(E)(1)(a), 440 Mass. 1319-1320 (2003). See American Bar Association, *Annotated Model Code of Judicial Conduct* (2004), p. 224, containing the same language. Decisions of the Supreme Judicial Court, building upon a court rule nearly identical to the present Canon 3, have laid down the following two-part recusal procedure for Massachusetts trial judges:

> "Faced . . . with a question of his capacity to rule fairly, the judge [must] consult first his own emotions and conscience. If he passed the internal test of freedom from disabling prejudice, he must next attempt an objective appraisal of whether this was 'a proceeding in which his impartiality might reasonably be questioned.' S.J.C. Rule 3:25, Canon (3)(C)(1)(a), 359 Mass. 841 (1972)."

Lena v. *Commonwealth*, 369 Mass. 571, 575, 340 N.E. 2d 884, 886-887 (1976). See *Haddad* v. *Gonzales*, 410 Mass. 855, 862, 576 N.E. 2d 658, 662-663 (1991). The appellate courts of Massachusetts review such determinations under the deferential "abuse of discretion" standard. *Haddad* v. *Gonzales*, 410 Mass. at 862, 340 N.E. 2d at 662.

QUESTION PRESENTED – Continued

Two questions are presented:

1. Whether the two-part self-analysis mandated by the Supreme Judicial Court of Massachusetts, which permits a trial judge, sitting in judgment of her own conduct, to determine whether to disqualify herself in a proceeding where her impartiality might reasonably be questioned, violates the right of litigants in State courts to a fair trial by a fair tribunal, as secured to them by the Fourteenth Amendment to the United States Constitution.

2. Whether the bias and prejudice manifested by the trial judge in this case were so pronounced as to violate the petitioner's right to a fair trial by a fair tribunal, as secured to her by the Fourteenth Amendment to the United States Constitution and, therefore, required that the defendants' motions for relief from judgment be allowed.

LIST OF PARTIES

This petition involves two cases which were consolidated for consideration by the Massachusetts Appeals Court. The two cases and the parties in each are listed below.

(a) Rafaele Loraine Demoulas, administratrix, & others, Plaintiffs-Appellees *vs.* Telemachus A. Demoulas & others, Defendants-Appellants, Massachusetts Appeals Court Docket No. 2003-P-1255:

Plaintiffs-Appellees

Rafaele Loraine Demoulas, administratrix of the Estate of Evan G. Demoulas and next friend of Vanessa Evan Demoulas;

Diana D. Merriam;

Fotene J. Demoulas;

Arthur S. Demoulas;

Evanthea Demoulas.

Defendants-Appellants

Telemachus A. Demoulas;

Arthur T. Demoulas;

Frances D. Kettenbach;

Glorianne D. Farnham;

Caren D. Pasquale;

Demoulas Super Markets, Inc.

LIST OF PARTIES – Continued

(b) Arthur S. Demoulas, Plaintiff-Appellee, *vs.* Demoulas Super Markets, Inc., & others, Defendants-Appellants, Massachusetts Appeals Court Docket No. 2003-P-1256 (consolidated with No. 2003-P-1255):

Plaintiff-Appellee

Arthur S. Demoulas

Defendants-Appellants

Demoulas Super Markets, Inc.;

Valley Properties, Inc.;

Market Basket, Inc.;

Doric Development Corp.;

Lee Drug, Inc.; and

Telemachus A. Demoulas,

Irene Demoulas,

Arthur T. Demoulas,

Frances D. Kettenbach,

Glorianne D. Farnham, and

Caren D. Pasquale, individually and as they are general partners of 231 Realty Associates.

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OPINION BELOW

The Massachusetts Appeals Court considered these two consolidated cases in an unpublished dispositive order issued October 26, 2004. See Appendix A, p. App. 1. The Appeals Court's brief order, which affirmed the denial of the defendants-appellants' emergency motions for relief from judgment, stated that the Court was acting for substantially the reasons set forth in the decision of the judge of the Superior Court (hereinafter, motion judge) dated July 3, 2003 (see Appendix B, p. App. 3), as well as on grounds urged in the appellees' brief, pp. 24-29 (challenging the timeliness of the defendants' motions) and 39-43 (asserting the preclusive effect of the law-of-the-case doctrine) (see Appendix F, p. App. 18).

STATEMENT OF JURISDICTION

The petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257. An order of the Massachusetts Supreme Judicial Court denying the petitioner's application for further appellate review (discretionary review) was entered December 23, 2004. See Appendix C, p. App. 5.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, amend. 14, § 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges

> or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

(a) The fifteen-year struggle for control of a family-held corporation

The proceedings in this protracted litigation are set forth extensively in *Demoulas* v. *Demoulas Super Mkts., Inc.*, 424 Mass. 501, 677 N.E. 2d 159 (1997) (*Demoulas I*); *Demoulas* v. *Demoulas Super Mkts., Inc.*, 428 Mass. 543, 703 N.E. 2d 1141 (1998) (*Demoulas II*); *Demoulas* v. *Demoulas*, 428 Mass. 555, 703 N.E. 2d 1149 (1998) (*Demoulas III*); and *Demoulas* v. *Demoulas*, 432 Mass. 43, 732 N.E. 2d 875 (2000) (*Demoulas IV*). The background of the cases is summarized below.

In 1990, two civil actions were commenced in Massachusetts' highest trial court, launching a contest for control of a family-held corporation, Demoulas Super Markets, Inc. (DSM). See Massachusetts Appeals Court Record Appendix (hereinafter, R. App.) at 1, 113. DSM operates a highly successful chain of supermarkets located in northeastern Massachusetts and central and southern New Hampshire. It also has extensive real estate holdings, including numerous shopping centers that contain DSM stores. See *Demoulas I*, 424 Mass. at 504-507, 677 N.E. 2d at 165-167. Together, the two cases involved disputes over

assets worth hundreds of millions of dollars. R. App. at 95-106, 184-185.[1]

The lawsuits were brought by one branch of the Demoulas family (the Arthur S. Demoulas branch) against the other branch (the Telemachus Demoulas branch). The petitioner, Frances D. Kettenbach, is a daughter of Telemachus Demoulas. See *Demoulas III*, 428 Mass. at 556-557, 569, 703 N.E. 2d at 1154-1155, 1162.

The Arthur S. Demoulas side essentially alleged that the Telemachus Demoulas side of the family had defrauded them over a period of years. The first case (the "Stock Transfer Action") was a personal claim brought by the individuals of the Arthur S. side against the individuals of the Telemachus side. See *Demoulas III*, 428 Mass. 555, 703 N.E. 2d 1149 (1999). The focal point in the Stock Transfer Action was the allegation, denied by the defendants, that the Telemachus side had fraudulently induced the sale of the plaintiffs' stock in DSM, thereby shifting ownership of DSM from a corporation where fifty percent of the shares were held by the Arthur S. side and fifty percent by the Telemachus side, to one where the Telemachus side owned a substantial majority. The second case (the "Derivative Action") was a shareholder's derivative claim brought by Arthur S. Demoulas on behalf of DSM against individuals on the Telemachus side, as well as against business entities created and owned by these individuals. See *Demoulas I*, 424 Mass. 501, 677 N.E. 2d

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[1] In a later judicial disciplinary proceeding against her, arising out of an unrelated matter, the trial judge testified, "It involved what I understand to be over a billion dollars." Massachusetts Commission on Judicial Conduct, Matter of Investigation of the Honorable Maria I. Lopez, transcript of testimony Nov. 20, 2002, p. 76, R. App. at 904.

159 (1997). In the Derivative Action, the plaintiff alleged that the business entities created by the Telemachus side had wrongfully diverted corporate opportunities of DSM.

During acrimonious and widely publicized pretrial litigation from 1990 through 1994, both cases were assigned to Superior Court Judge Maria I. Lopez. R. App. at 194. In 1994, Judge Lopez first presided over the jury trial of the Stock Transfer Action. *Id.* At the close of that case, Judge Lopez directed a verdict in favor of the second generation of the Telemachus side (Telemachus's children). R. App. at 33. Thereafter, the jury found against Telemachus personally, in favor of the individuals on the Arthur S. side. R. App. at 34, 194.

Next, the Derivative Action was tried to Judge Lopez, sitting without a jury, over the course of six months, ending in May, 1995. R. App. at 194-195. The Supreme Judicial Court described the trial as "long, arduous, and, at times, very bitter." *Demoulas I*, 424 Mass. at 526, 677 N.E. 2d at 178. About six weeks after the close of the evidence, Judge Lopez issued a sweeping ruling against the Telemachus side. That ruling required the defendants to transfer to DSM all of the assets which the judge found to have been derived from corporate opportunities wrongfully diverted from DSM. R. App. at 162-163. The very next day, Judge Lopez, acting entirely on her own initiative, reached back one year and set aside the directed verdict in the Stock Transfer Action which she had granted in favor of Telemachus's children, and instead directed a verdict for the Arthur S. side. R. App. at 38-39. Telemachus's children were never given an opportunity to be heard or to offer evidence, as they would otherwise have done had it not been for the directed verdict.

(b) The motions for recusal

On three occasions, Judge Lopez denied the defendants' motions that she recuse herself from the case.[2] In each instance, her decision was affirmed by the Supreme Judicial Court.

The first recusal motion. Before the start of the trial in the Derivative Action, Judge Lopez denied the defendants' motion that she recuse herself from presiding over that trial, based on the perception of bias that she had created by certain statements she had made. R. App. at 152-153. On appeal, the Supreme Judicial Court affirmed her decision denying the motion to recuse, relying on its impression that

> "[she] appears to have concluded that she would be able to act fairly and impartially in deciding the issues in the shareholder derivative action, and that, objectively considered, the case was not a proceeding in which her impartiality might reasonably be questioned based on assertions of bias or prejudice concerning any party."

Demoulas I, 424 Mass. at 525, 677 N.E. 2d at 177.

---

[2] "Traditionally, 'recusal' has referred to a judge's voluntary, discretionary decision to step down in a case, while 'disqualification' refers to a motion for the statutorily or constitutionally mandated removal of a judge from a case. *See* Richard E. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges* § 1.1 at 4-5 (1986). However, 'in many jurisdictions the term "disqualification" has been defined in such a way as to include both removal by a judge on his own motion and removal at the request of a party. In fact in modern practice the terms "disqualification" and "recusal" are frequently viewed as synonomous and are often used interchangeably.' *Id.*" American Bar Association, *Annotated Model Code of Judicial Conduct* (2004), p. 186.

The second recusal motion. In June, 1997, the defendants filed their second motion for recusal, after learning of allegations of extrajudicial contact between Judge Lopez and the lead counsel for the plaintiffs, Mr. Robert Gerrard. The allegations were supported by the statements of witnesses that Judge Lopez and Mr. Gerrard had had social contact on numerous occasions at a Boston restaurant owned by Judge Lopez's husband. R. App. at 193, 197-198, 1485-1486, 1488-1490. In addition to the motion to recuse, the defendant Arthur T. Demoulas filed a complaint against Judge Lopez with the Massachusetts Commission on Judicial Conduct (hereinafter, CJC) regarding the alleged conduct at the restaurant. R. App. at 450-451.

One month after the complaint to the CJC, Judge Lopez convened a hearing on the defendants' recusal motion. R. App. at 56-57. She proceeded to rule on it without affording the defendants the opportunity to present witnesses or the right to confront and cross-examine adverse witnesses. In her order, Judge Lopez stated that she had applied the test of Canon 3(C)(1)(a) (now recodified as Canon 3(E)(1)(A)) and had "examined [her] conscience [and] can impartially discharge the two remaining issues in these cases." *Demoulas III*, 428 Mass. at 545, 703 N.E. 2d at 1143-1144. See R. App. at 195. The Supreme Judicial Court affirmed Judge Lopez's decision. 428 Mass. at 552, 703 N.E. 2d at 1147.

The third recusal motion. In 1999, the defendants filed a third motion that Judge Lopez recuse herself, alleging (based on information developed by investigators acting in undercover roles) that she had told a law clerk,

> "before the trial of the [second case] commenced, that 'she knew who the "bad and the good guys were" and who the winners were going to be before the case began'; that 'he [the law clerk] will easily tell who was lying and that the [p]laintiff's physical evidence will be overwhelming'. . . ."

Demoulas IV, 432 Mass. at 47, 732 N.E. 2d at 87. Judge Lopez "denied the defendant children's motion[] to recuse without a hearing. Her order states that she applied the appropriate test governing a recusal request." 432 Mass. at 50, 732 N.E. 2d at 881. See R. App. at 90, 451. Judge Lopez once more had sat in judgment of her own conduct. In June, 2000, the Supreme Judicial Court affirmed her ruling. 432 Mass. at 55, 732 N.E. 2d at 884. In doing so, it acted for the third time in reliance upon Judge Lopez's assertion that she was completely impartial and that she had disclosed on the record all relevant facts.

(c) Subsequent revelations; the motions for relief from judgment

The CJC proceeding against Judge Lopez. Little more than a year after the Supreme Judicial Court's decision, during judicial disciplinary proceedings against her, Judge Lopez admitted to a very different state of mind. Her testimony before the CJC raised disturbing questions about the accuracy of her earlier representations and her compliance with the candor requirements of the rules governing judicial conduct.

In 2001, at a time when proceedings following the fourth appeal in these cases were still pending before Judge Lopez in the Superior Court, the CJC charged her with six counts of misconduct, in violation of twelve separate canons of the Code of Judicial Conduct. Commission on Judicial

Conduct, Matter of Investigation of the Honorable Maria I. Lopez, Report of Hon. E. George Daher, Hearing Officer (hereinafter, hearing officer's report), p. 1, R. App. at 746. The charges arose from a criminal trial, unrelated to the Demoulas proceedings, over which Judge Lopez had presided in August and September, 2000. Hearing officer's report, pp. 1-62, R. App. at 746-807.

One of the charges brought against Judge Lopez by the CJC resulted from her manifestly improper actions after receiving notice of a certain complaint against her, brought by an elderly nun, Sister Angela Beaucage. Transcript of hearing (hereinafter, Tr.) Oct. 31, 2001, pp. 152-153, R. App. at 742. Hearing officer's report, pp. 62-66, R. App. at 807-811. On receiving notice of Sister Beaucage's complaint, Judge Lopez placed an anonymous telephone call on November 1, 2000, just after 11:00 P.M., to the complainant's home. Hearing officer's report, p. 62, R. App. at 807. During her testimony in connection with the CJC investigation, Judge Lopez explained her telephone call as a reasonable reaction to what she described as "persecution" she suffered at the hands of her "enemies," namely, the Demoulas defendants.

> Q. "Why did you take matters into your hands at that point, that night at eleven o'clock?"
>
> A. "Well, you know what. I think I was a little frustrated. I was a little concerned because I have been persecuted by some very powerful enemies I made in a very big case. And I'm sure you're not familiar with what I went through with the Demoulas losing side and their lawyers . . . I truly believed – and I still believe it to this day that even if she's a real person . . . she [Sister

> Beaucage] could have been put up to it [by the Demoulas defendants]."

Tr. Oct. 31, 2001, p. 154, R. App. at 743. Additionally, Judge Lopez, in equally bizarre testimony, asserted that she was "persecuted," "besieged," and "attacked" by the Demoulas defendants and their counsel, Tr. Nov. 20, 2002, pp. 74, 83, R. App. at 903, 905, and that the defendants and their counsel instigated or filed false affidavits against her, had her followed, searched her trash, placed electronic listening devices in her home and her judicial chambers, and illegally reviewed her financial records. Tr. Oct. 31, 2001, p. 154, R. App. at 743. Tr. Nov. 20, 2002, pp. 78-79, R. App. at 904. Indeed, Judge Lopez speculated that many of the complaints brought by the CJC, not only Sister Beaucage's, were attributable to her "enemies," the Demoulas defendants:

> A. " . . . [G]iven my experience in the Demoulas case and what I have been through, and if the FBI would share with you some of the strategies that they've employed against me to discredit me, I would believe that they would hire firms to get complaints out, to call, you know, state [representatives] to create a huge, huge issue over me.
>
> "So I suspect that a number of these complaints were instigated by Demoulas, the loser side, and their lawyers."
>
> Q. "You're saying that even today with regard to complaints before the Commission in this *Horton* matter, that you believe some percentage of those have been inspired by Demoulas enemies?"
>
> A. "More that inspired. I believe that given my experience over the years, what I've gone

> through for three or four years in the Demoulas litigation, I believe that getting people to write complaints about me, to call their state [representatives], would be consistent and even – I mean doesn't even compare to some of the egregious things they've done to me.
>
> "So yes, I believe that. I believe the media attention was probably instigated by them.
>
> "You know, I'm a victim here. . . ."

Tr. Oct. 31, 2001, pp. 159-160, R. App. 744.

On April 9, 2003, the defendants moved for relief from judgment in both cases. Appendix G, p. App. 27. Judge Lopez resigned after the hearing officer in the CJC proceeding issued his decision concluding that she had violated several of the canons of judicial conduct. Hearing officer's report, pp. 37-91, R. App. at 782-836. The defendants' motions for relief from judgment were referred to a different judge of the Superior Court. R. App. at 111, 191.

(d) The time and manner of raising the Federal questions sought to be reviewed

Federal due process claims were advanced at every stage of the proceedings on the defendants' motions for relief from judgment – before the motion judge, the Appeals Court, and the Supreme Judicial Court. Notwithstanding the fact that the defendants, including the petitioner, persistently challenged the judgments on Federal constitutional grounds, no State Court ever rendered a decision on the merits of their federally-based contentions. See Appendix A, p. App. 1; Appendix B, p. App. 3; Appendix C, p. App. 5. The relevant materials before the motion judge in the

Superior Court are reproduced in Appendix G, p. App. 27, and Appendix H, p. App. 31.

After the motion judge in the Superior Court had denied relief from judgment, the defendants next advanced their Federal constitutional contentions in the Appeals Court. Relevant portions of their brief dated December 10, 2003, are reproduced in Appendix I, p. App. 36. See also the defendants' reply brief, the relevant portion of which is reproduced in Appendix J, p. App. 41.

Finally, the petitioner specifically asked the Supreme Judicial Court to consider the vital question whether the recusal test itself is unconstitutional on the ground that it abridges federally guaranteed due process rights. Appendix K, p. App. 45.

REASONS FOR ALLOWANCE OF THE WRIT

I. REVIEW IS NECESSARY BECAUSE MASSACHUSETTS JUDICIAL RECUSAL PROCEDURES, WHICH PERMIT A JUDGE TO SIT IN JUDGMENT OF HER OWN ALLEGED MISCONDUCT, VIOLATE FEDERAL DUE PROCESS GUARANTEES AND ARE IN CONFLICT WITH THE DECISIONS OF THIS COURT

A. The Judge Exhibited Actual Bias

When she ruled on the defendants' three motions seeking her recusal, Judge Lopez effectively was sitting as judge in her own cause. On the basis of ancient nonconstitutional principles, as well as plain common sense, this was impermissible. See *Earl of Derby's Case*, 77 Eng. Rep. 1390 (K.B. 1614), in which Lord Chief Justice Coke declared, "No man can be a judge in his own cause." See, to

the same effect, *Bonham's Case*, 77 Eng. Rep. 646 (K.B. 1609); Note, Disqualification of Judges for Bias in the Federal Courts, 79 Harv. L. Rev. 1435, 1435-1436 (1966). This Court, while recognizing that the Constitution does not reach every issue of judicial qualification, has reasoned, "[I]t certainly violates the Fourteenth Amendment . . . to subject [a person's] liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." *Tumey* v. *Ohio*, 273 U.S. 510, 523 (1927). Similarly, this Court has concluded that, under the due process clause, no judge "can be a judge in his own case [or be] permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136 (1955) (Black, J.). The Court in *Murchison* acknowledged that the degree or kind of interest sufficient to disqualify a judge from sitting "cannot be defined with precision." *Ibid.* More recently, it has stated that "a reasonable formulation of the issue is whether the 'situation is one "which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true."'" *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813, 822 (1986), quoting *Ward* v. *Village of Monroeville*, 409 U.S. 57, 60 (1972).

Due process "requires a 'fair trial in a fair tribunal' . . . before a judge with no actual bias against the defendant or interest in the outcome of his particular case." *Bray* v. *Gramley*, 520 U.S. 899, 904-905 (1977), quoting *Withrow* v. *Larkin*, 421 U.S. 35, 46 (1975). The "interest" deemed constitutionally sufficient to preclude a judge's participation in a particular case has been pecuniary, *Aetna Life Ins. Co.* v. *Lavoie*, *supra* (judge's decision enhanced his likelihood of favorable settlement in his own litigation);

institutional, *Ward* v. *Village of Monroeville*, *supra* (mayor presided over court which was significant source of municipal revenue); or personal, *Mayberry* v. *Pennsylvania*, 400 U.S. 455 (1971) (judge had been vilified by defendant in contempt proceeding). In addition to these interests, this Court should also recognize a judge's professional and intellectual stake in asserting her impartiality and in affirming the propriety of her conduct. "For many, if not most, figures in public life, avoiding a cloud over one's professional judgment is a consideration a great deal more important than financial gain." *DelVecchio* v. *Illinois Dep't of Corrections*, 31 F.3d 1363, 1399 (7th Cir. 1994) (Ripple, J., dissenting), cert. denied, 514 U.S. 1037 (1995). See *State* v. *O'Neill*, 261 Wis. 2d 534, 547, 663 N.W. 2d 292, 299 (Wis. App. 2002) (noneconomic interest may require recusal on due process grounds). That is the situation here. Judge Lopez had been specially assigned to the *Demoulas* litigation. R. App. at 193. She repeatedly showed a strong, indeed tenacious, desire to remain on these cases. Her overriding personal interests, together with the bias revealed in the CJC hearings, made totally unrealistic the self-analysis prescribed by the Massachusetts judicial recusal test. See Note, Disqualification of Judges and Justices in the Federal Courts, 86 Harv. L. Rev. 736, 755-756 (1973) (noneconomic interests requiring disqualification).

It is rare for a judge's bias to be established by his or her own words. In *Berger* v. *United States*, 255 U.S. 22, 32-36 (1921), this Court acted decisively under the recusal statute (28 U.S.C. § 144, as then in effect), to make clear that two defendants of German ancestry could not be subjected to trial before a judge who had publicly slurred people of German origin. The case at bar presents a

similar situation in that Judge Lopez's sworn testimony before the CJC unmistakably demonstrates paranoia, bias, and partiality. If Judge Lopez believed that the defendants (her "enemies") had had her followed, searched her trash, eavesdropped on her, and illegally reviewed her financial records, she was obviously incapable of being impartial. Her testimony projected actual bias which precludes dispassionate judgment. The record leaves one "with an abiding impression that the trial judge permitted [herself] to become personally embroiled" with the case. *Ungar* v. *Serafite*, 376 U.S. 575, 585 (1964). See *Offutt* v. *United States*, 348 U.S. 11, 17 (1954). Even though Federal due process principles required that the petitioner be afforded a hearing to determine the extent of Judge Lopez's bias, and how and when such bias developed, the Massachusetts courts denied her that right.

B. The Strong Appearance of Bias Was Present

The due process clause requires a judge to recuse herself without a showing of actual bias where a sufficient motive to be biased exists. See *Tumey* v. *Ohio*, 273 U.S. 510, 532 (1927). Where temptations "not to hold the balance nice, clear, and true" exist, due process principles "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between the contending parties. . . . But to perform its high functions in the best way, 'justice must satisfy the appearance of justice.'" *In re Murchison*, 349 U.S. 133, 136 (1955) (citations omitted). *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813, 875 (1986). See *Alexander* v. *Primerica Holdings, Inc.*, 10 F.3d 155, 166 (3d Cir. 1993) ("[w]hen the judge is the actual trier of fact, the need to preserve the appearance of impartiality is especially

pronounced"). In the *Demoulas* litigation, with the exception of the trial of the Stock Transfer Action, all of the decisions were made by Judge Lopez without a jury. The appearance of bias is overwhelming; the appearance of justice is conspicuously lacking.

On three occasions the judge denied the defendants' motions that she recuse herself. She denied the defendants a meaningful hearing on two of their recusal motions. R. App. at 858, 451. Nevertheless, in the denial of the defendants' motions for relief from judgment, both the Superior Court motion judge (Appendix B, p. App. 3) and the Appeals Court (Appendix A, p. App. 1) relied on Judge Lopez's findings on the recusal issue. The appearance of bias was created by Judge Lopez's conduct that prompted the defendants' recusal motions, by her treatment of the motion proceedings, and by her subsequent CJC testimony.

Courts in several States, but not Massachusetts, have held that the appearance of bias or impropriety, as distinct from actual bias or impropriety, is sufficient to implicate due process rights. See, *e.g.*, *Commonwealth* v. *Brandenburg*, 114 S.W. 3d 830 (Ky. 2003) (recusal of trial court commissioner was constitutionally required by appearance of impropriety); *Wolfkill Feed & Fertilizer Corp.* v. *Martin*, 103 Wash. App. 836, 14 P.3d 877 (2000) (due process, the appearance of fairness, and the Code of Judicial Conduct all require disqualification of judge whose impartiality might reasonably be questioned). In *Brengelmann* v. *Land Resources of New England & Canada, Inc.*, 393 A.2d 174, 178 (Me. 1978), the Supreme Judicial Court of Maine ruled:

> "[The appellant] . . . correctly argues that the Supreme Court of the United States has recognized that even where actual bias or prejudice on the part of a Judge is not, or cannot be, shown, in some kinds of circumstances a *per se* prophylactic rule of judicial disqualification is operative to guarantee due process of law. There are patterns of circumstances as to which 'experience teaches that the probability of actual bias . . . is too high to be constitutionally tolerable.' See *Withrow* v. *Larkin*, 421 U.S. 35, 47 . . . (1975)."

Decisions of the United States Courts of Appeals in two Circuits suggest a line of authority adopting a contrary position. *DelVecchio* v. *Illinois Dep't of Corrections*, 31 F.3d 1363, 1370-1380 (7th Cir. 1994) (rehearing en banc; appearance of partiality not requiring recusal of State court judge), cert. denied, 514 U.S. 1037 (1995). *Johnson* v. *Carroll*, 369 F.3d 253, 260 (3d Cir. 2004) (appearance of bias, without more, not requiring State judge to recuse himself *sua sponte* under due process clause), petition for cert. filed, No. 04-7553. Review by this Court is warranted in order to resolve this conflict as to the boundaries of the due process protections afforded to litigants in State courts.

II. REVIEW IS NECESSARY TO RESOLVE A CONFLICT AMONG STATE COURTS AFFECTING THE DUE PROCESS RIGHTS OF LITIGANTS SEEKING RECUSAL OF A JUDGE WHOSE IMPARTIALITY MIGHT REASONABLY BE QUESTIONED

The American Bar Association's Model Code of Judicial Conduct, which is the source of Massachusetts Supreme Judicial Court Rule 3:09, Canon 3(E)(1)(a), does not

address the methods for handling a motion for recusal. See American Bar Association, *Annotated Model Code of Judicial Conduct* (2004), pp. 184-251. In a majority of the States, including Massachusetts, the decision whether to grant or deny a motion to recuse reposes within the sound discretion of the challenged judge. See Leslie W. Abramson, Deciding Recusal Motions: Who Judges the Judges? 28 Val. U. L. Rev. 543, 545-547 & n. 5 (1994) (identifying, as of 1994, the twenty-seven States in which the challenged judge rules on the motion to disqualify). In several other jurisdictions, the challenged judge may decide only the timeliness of the motion and the legal sufficiency of the supporting affidavit. If the challenged judge finds that the motion is timely and that recusal would be required if some or all of the facts set forth in the affidavit are true, then another judge is assigned to consider the motion. *Id.*, at 552-553. In the remaining States, the challenged judge must, in every instance, transfer the recusal motion to a different judge. *Id.*, at 553-558.

Even in jurisdictions where the challenged judge is normally permitted to rule on the merits of a recusal motion, courts have recognized situations where self-analysis by an obviously biased judge is impossible. Simply to trust the integrity of such a judge rests on a fundamentally flawed assumption. Thus in *Surratt* v. *Prince George's County*, 320 Md. 439, 466, 578 A.2d 745, 758 (1990), the Maryland Court of Appeals, citing the Federal recusal statute, 28 U.S.C. § 144, and expressing due process concerns, held that "when the asserted basis for recusal is personal conduct of the trial judge . . . then the trial judge must permit another judge to decide the motion for recusal." Accord, *Gillum* v. *United States*, 613 A.2d 366, 369 (D.C. 1992). An opinion of the Second

Circuit has stated, "A claim of personal bias and prejudice strikes at the integrity of the judicial process, and it would be intolerable to hold that the disclaimer of prejudice by the very jurist who is accused of harboring it should itself terminate the inquiry until an ultimate appeal on the merits." *In re International Bus. Machs. Corp.*, 618 F.2d 923, 926-927 (2d Cir. 1980) (mandamus as remedy for judge's wrongful refusal to disqualify himself). By contrast, current Massachusetts jurisprudence would protect a judge who chooses bias, or even a corrupt judge, who simply recites the Supreme Judicial Court's recusal formula from *Lena* v. *Commonwealth*, 369 Mass. 571, 575, 340 N.E. 2d 884, 886-887 (1976), quoted *supra*, p. i.

As discussed in part I, *supra*, the decisions of this Court establish that both bias and the appearance of bias on the part of State-court judges have a Federal constitutional dimension. For this reason, review is warranted in order to resolve the conflict between State courts as to precisely how the due process rights of litigants are to be protected.

III. THE PETITIONER ACTED IN A TIMELY MANNER IN ADVANCING HER CONTENTION THAT THE MASSACHUSETTS JUDICIAL RECUSAL PROTOCOL ABRIDGED HER FEDERALLY SECURED DUE PROCESS RIGHTS

For three reasons, the petitioner's due process contention was appropriately made in the first instance in her application for discretionary review by the Supreme Judicial Court.

First, and foremost, the petitioner was advocating the alteration of an established rule of law. Under precedent

dating from the Appeals Court's first year of operation, that Court has never assumed the authority to alter an established rule of law, such as the judicial recusal protocol, once such a rule has been laid down by the Supreme Judicial Court. *Burke* v. *Toothaker*, 1 Mass. App. Ct. 234, 239, 295 N.E. 2d 184, 186-187 (1973) (rule of substantive liability). *Commonwealth* v. *Pugh*, 2 Mass. App. Ct. 903, 904 (1974), 320 N.E. 2d 841 (evidentiary rule). In this regard, the views of a retired Justice of the Supreme Judicial Court, who formerly held the position of reporter for this Court's Advisory Committee on the Federal Rules of Civil Procedure, are particularly instructive: "[W]here a sequence of decisions of the supreme court of the State [is] unimpaired, . . . the intermediate court is not to make law but to follow orders." Benjamin Kaplan, Do Intermediate Appellate Courts Have a Lawmaking Function? 70 Mass. L. Rev. 10, 13 (1984). On several occasions, the Supreme Judicial Court has granted discretionary review in order to modify a settled rule of law. See, *e.g.*, *McDonough* v. *Whalen*, 365 Mass. 506, 511-512, 313 N.E. 2d 435, 438-439 (1974); *Erhard* v. *F.W. Woolworth Co.*, 374 Mass. 352, 357, 372 N.E. 2d 1277, 1280-1281 (1978), each case announcing a new rule of law different from that applied by the Appeals Court. This is what the petitioner would have asked the Supreme Judicial Court to do if it had granted further appellate review in this case.

Second, the petitioner would have sought on further appellate review to invoke the power of superintendence over inferior courts. By statute, this power is specifically reserved to the Supreme Judicial Court. Mass. Gen. L. c. 211, § 3 (West 2005). See Daniel J. Johnedis, Massachusetts' Two-Tier Appellate System in Operation, 60 Mass. L.Q. 77, 88 (1973) (Appeals Court lacking power to establish new

procedural rules applicable to inferior courts; author was then chief staff counsel to Supreme Judicial Court).

Third, the petitioner, on further appellate review, would have challenged the constitutionality of the Supreme Judicial Court's exercise of its own rule making power. See *Matter of Jadd*, 391 Mass. 227, 461 N.E. 2d 760 (1984), where the Supreme Judicial Court held that its rule prescribing a residency requirement for attorneys seeking admission on motion to the Massachusetts bar violated the privileges and immunities clause of the United States Constitution. U.S. Const., art. 4, § 2, cl. 1. In the present case, the petitioner's remedy lay exclusively within the province of the Supreme Judicial Court. That Court refused to consider the merits of her Federal constitutional claim.

IV. THE PETITIONER'S DUE PROCESS CLAIM IS NOT PROCEDURALLY FORECLOSED, BECAUSE THE DECISION OF THE MASSACHUSETTS APPEALS COURT DID NOT REST ON AN INDEPENDENT AND ADEQUATE STATE-LAW GROUND

The Massachusetts Appeals Court never reached the merits of the defendants' due process contentions. See Appendix A, pp. App. 1-App. 2. That Court based its decision on two State-law grounds: *first*, that the motions for relief from judgment were untimely, see Appendix F, pp. App. 19-App. 22, and *second*, that the issues that the defendants sought to raise were barred by the law-of-the-case doctrine, see Appendix F, pp. at App. 22-26. Neither is a State-law ground of the character that would foreclose this Court's review of the petitioner's due process claim.

This Court will not review a question of Federal law decided by a State court if the decision of the State court rests on a State-law ground that is independent of the Federal question and is adequate to support the judgment. *Lambrix* v. *Singletary*, 520 U.S. 518, 522-523 (1997). See *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). This principle applies whether the State-law ground is substantive or procedural. *Coleman* v. *Thompson*, 501 U.S. 722, 729 (1991). However, this Court recognizes that "the adequacy of state procedural bars to the assertion of federal questions is itself a federal question." *Douglas* v. *Alabama*, 380 U.S. 415, 422 (1965). Thus, for a State procedural rule to be adequate to foreclose review of a Federal claim, this Court requires that it be "firmly established and regularly followed." *James* v. *Kentucky*, 466 U.S. 341, 348-349 (1984). As will be apparent from the discussion *infra*, part IV-A, neither State-law ground adopted by the Massachusetts Appeals Court meets this demanding test.

This Court also acknowledges the existence of "exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question." *Lee* v. *Kemna*, 534 U.S. 362, 376 (2002). A State procedural ground is "adequate" only where "the State's insistence on compliance with its procedural rule serves a legitimate state interest." *Wainwright* v. *Sykes*, 433 U.S. 72, 83 n. 8 (1977) (citation omitted). See *Davis* v. *Wechsler*, 263 U.S. 22, 24 (1923) (Holmes, J.) ("Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice"). See also Daniel J. Meltzer, State Court

Forfeitures of Federal Rights, 99 Harv. L. Rev. 1128, 1142 (1986) ("[T]he most important category of inadequate State grounds includes those rules that, even if fairly and consistently applied, heavily burden the assertion of federal rights without significantly advancing any important state policy"). In this case the defendants' assertion of Federal due process rights was "plainly and reasonably made" at each stage of the proceeding. Furthermore, the presence of unique circumstances, bearing directly upon the integrity of the judicial process itself, make this an "exceptional case" within the contemplation of the Court in *Lee* v. *Kemna*, 534 U.S. at 376.

A. The State Procedural Grounds Identified by the Massachusetts Appeals Court Are Neither Firmly Established Nor Regularly Followed

1. The Massachusetts Courts Do Not Require that a Motion for Relief from Judgment Based on a Claim of Fraud Upon the Court Be Brought Within One Year After the Judgment Was Entered

The plaintiffs argued, and the Appeals Court appears to have believed, that the defendants' motion for relief from judgment, framed under Mass. R. Civ. P. 60(b), 365 Mass. 828 (1974), was subject to the one-year period of limitation applicable to motions brought pursuant to rule 60(b)(1), (2), and (3) because it was based on "fraud," namely Judge Lopez's failure to disclose her bias against the defendants. Compare Mass. R. Civ. P. 60(b)(6) ("any other reason justifying relief from the operation of the judgment"). See Appendix A, pp. App.1-App. 2, adopting pp. 24-29 of the plaintiff's brief on appeal. See Appendix F,

at pp. App. 19-App. 22. The Massachusetts courts, however, have no "firmly established and regularly followed" practice of treating this kind of fraud as being governed by the one-year limitation period. No published decision indicates that the Supreme Judicial Court would do so. To the contrary, the courts have consistently distinguished between fraud committed by a litigant, on the one hand, and fraud committed by the Court, its personnel, or its officers, *i.e.*, "fraud upon the court," on the other. *MacDonald* v. *MacDonald*, 407 Mass. 196, 202, 552 N.E. 2d 533, 536 (1990). When it comes to a fraud upon the Court, "[t]here is no time limitation that would bar a judge from setting aside a judgment." *Sahin* v. *Sahin*, 435 Mass. 396, 405-406, 758 N.E. 2d 132, 140-141 (2001). See *MacDonald*, 407 Mass. at 202 n. 10, 552 N.E. 2d 536 n. 10; *Winthrop Corp.* v. *Lowenthal*, 29 Mass. App. Ct. 180, 183, 558 N.E. 2d 1138, 1140 (1990). See also *In re Tri-Cran, Inc.*, 98 B.R. 609, 614-616 (Bankr. D. Mass. 1989) ("To vindicate the integrity of the judicial process, a court may entertain a complaint for fraud on the court long after the judgment itself was entered," *id.*, at 614) (citation omitted).

It is beyond question that the "fraud" at issue here was "fraud on the Court." Accordingly, in light of these precedents, Massachusetts has no "firmly established and regularly followed" practice which would impose the one-year limitation period to bar the defendants' motions for relief from judgment. Therefore, the timeliness of the defendants' motions, in relation to the one-year limitation period, does not constitute an independent and adequate State-law ground foreclosing this Court's review of the petitioner's due process claim. The motions for relief from judgment were brought, in a timely manner, shortly after

the defendants became aware of Judge Lopez's testimony before the CJC. R. App. at 461.

2. The Law-of-the Case Doctrine Is a Permissive, Nonmandatory Policy

The Appeals Court adopted the plaintiffs' argument that the Supreme Judicial Court's decisions affirming the denial of the defendants' three previous motions seeking the recusal of Judge Lopez constitute the "law of the case" and, accordingly, compelled the denial of their motion under Mass. R. Civ. P. 60(b) for relief from judgment. See Appendix A, pp. App. 1-App. 2, adopting pp. 39-43 of the plaintiffs' brief on appeal. See Appendix F, pp. App. 22-App. 26. To the contrary, the law-of-the-case doctrine has no application here. Far from being a procedural rule "firmly established and regularly followed" in the Massachusetts courts, the law-of-the-case doctrine in Massachusetts is merely a permissive, nonmandatory policy that "reflects th[e] court's reluctance 'to reconsider questions decided upon an earlier appeal in the same case.'" *King* v. *Driscoll*, 424 Mass. 1, 7-8, 673 N.E. 2d 859, 863 (1996), quoting from *Peterson* v. *Hopson*, 306 Mass. 597, 599, 29 N.E. 2d 140, 143 (1940). *Vittands* v. *Sudduth*, 49 Mass. App. Ct. 401, 413 n. 19, 730 N.E. 2d 325, 337 n. 19 (2000). See *Conley* v. *United States*, 323 F.3d 7, 13 (1st Cir. 2003) (law of the case can be avoided where, for example, "there has been a change in prevailing law or where there is new evidence on the question at issue").

As simply stated, the doctrine provides that an issue, "once decided, should not be reopened 'unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the

law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice.'" *King* v. *Driscoll*, 424 Mass. at 8, 673 N.E. 2d at 863, quoting from *United States* v. *Rivera-Martinez*, 931 F.2d 148, 151 (1st Cir.), cert. denied, 502 U.S. 862 (1991). The law-of-the-case doctrine is inapplicable when new facts or evidence bearing on a previously-decided issue has been discovered and brought before the Court. This case presents precisely the situation, foreseen by the opinion in *King* v. *Driscoll*, *supra*, in which the Massachusetts courts have heretofore declared their willingness to reexamine a decision that would work manifest injustice if allowed to stand. No published decision of the Supreme Judicial Court indicates that law-of-the-case principles would interpose a bar to the petitioner's assertion in that Court of her Federal constitutional rights. In the present case, newly discovered evidence that parties were denied their due process rights should have received a hearing, especially when that newly discovered evidence is the sworn testimony of the trial judge herself, who built the "law of the case" in the first instance. The law-of-the-case doctrine cannot be an independent and adequate State-law ground such as to foreclose review of the petitioner's Federal due process claim by this Court.

B. No Massachusetts State Policy Would Be Served by Burdening the Petitioner's Assertion of Her Federal Rights

A State-law ground, to be adequate to justify this Court's abstention from reviewing the petitioner's due process claim, must advance a legitimate State interest. *Wainwright* v. *Sykes*, 433 U.S. 72, 83 n. 8 (1977). *Trevino* v. *Texas*, 503 U.S. 562, 566-567 (1992) (per curiam) (State's

formulaic interest in its procedural rules inadequate to bar review of Federal claim). In the highly unusual circumstances of this case, adherence to State procedural formalities – either the law-of-the-case principle or the one-year limitation period for bringing the defendants' motion – would advance no conceivable State interest. The overarching State interest in this case is "the purity of the judicial process and its institutions." *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 403 F.2d 437, 439-440 (5th Cir. 1968) (holding that the doctrines of res judicata and collateral estoppel were inapplicable to a motion for relief from judgment under Fed. R. Civ. P. 60(b), based on 28 U.S.C. § 455, where supplementary facts were added in the subsequent motion to vacate). Legitimate State interest favors this Court's review of the petitioner's due process claim.

The need for an objective determination of a trial judge's impartiality is grounded not only in the litigants' constitutional right to due process, but also in the public's right to a judicial system in which it can have confidence. No previous appellate consideration of this case has determined the constitutionality of the Massachusetts judicial recusal formula. It is essential to the public's continued confidence in the judiciary that the petitioner's constitutional contention receive review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS B. MERRITT
Counsel of Record for Petitioner
26 Cottage Street
Post Office Box 324
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APPENDIX A

816 N.E.2d 559 (Table)

NOTICE: THIS IS AN UNPUBLISHED OPINION.

Appeals Court of Massachusetts.

Rafaele L. DEMOULAS, administratrix,[1] & others,[2]

v.

Telemachus A. DEMOULAS & others[3]
(and a companion case[4]).

No. 03-P-1255.

Oct. 26, 2004.

MEMORANDUM AND ORDER
PURSUANT TO RULE 1:28

For substantially the reasons set forth in the motion judge's decision dated July 3, 2003, as well as for substantially those reasons set forth in the appellees' brief at pages twenty-four through twenty-nine and thirty-nine

---

[1] Of the estate of Evan G. Demoulas and as next friend of Vanessa Evan Demoulas.

[2] Diana D. Merriam, Fotene J. Demoulas, Arthur S. Demoulas, and Evanthea Demoulas.

[3] Arthur T. Demoulas; Frances D. Kettenbach; Glorianne D. Farnham; Caren D. Pasquals; and Demoulas Super Markets, Inc.

[4] Arthur S. Demoulas v. Demoulas Super Markets, Inc.; Valley Properties, Inc.; Market Basket, Inc.; Doric Development Corp.; Lee Drug, Inc.; and Telemachus A. Demoulas, Irene Demoulas, Arthur T. Demoulas, Frances D. Kettenbach, Glorianne D. Farnham, and Caren D. Pasquale, individually and, where applicable, as general partners of 231 Realty Associates.

through forty-three, we discern no abuse of discretion in the judge's denial of the defendant's rule 60(b) motion.

Assuming Attorney Gerrard's affidavits consisted wholly of inadmissible hearsay (but see Appellee Br. at 46-47), they formed no large part of the motion judge's decision – or our disposition – and admission was beyond doubt harmless.

Order denying emergency motion to strike affidavit of Robert C. Gerrard and for other relief affirmed.

Order denying motion for relief from judgment affirmed.

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. **SUPERIOR COURT**
CIVIL ACTION
NOS. 90-2927 and 90-2344

ARTHUR S. DEMOULAS, ET AL. PLAINTIFFS

vs.

DEMOULAS SUPERMARKETS, INC., ET AL., DEFENDANTS

MEMORANDUM OF DECISION AND ORDER ON EMERGENCY MOTION OF DEFENDANTS' TELEMACHUS DEMOULAS ET. AL. FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 60(b)

After review of the filings on this motion, and the applicable Supreme Judicial Court decisions on the case, I conclude that no substantial issue is raised by the motion, that no hearing is necessary, and that defendants' motion must therefore be denied. Justice Lopez's testimony before the Judicial Conduct Commission does not evidence any bias against the defendants which may have affected her rulings. That Justice Lopez was upset at the false allegations made against her by the defendants' attorneys may have been true, but there is no evidence that she did not do exactly as she said in her Memorandum of Decision dated July 22, 1997, namely, to separate her feelings about having her integrity unfairly challenged from her responsibility to make fair and impartial rulings.

ORDER

The emergency motion of defendants' Telemachus Demoulas et. al. for relief from judgment is ***denied.***

/s/ Patrick F. Brady
Patrick F. Brady
Justice, Superior Court

3 July 03
Entered 7/10/03

APPENDIX C

Supreme Judicial Court for
the Commonwealth of Massachusetts
One Beacon Street, Third Floor,
Boston, Massachusetts 02108
(617) 557-1020

Thomas B. Merritt, Esquire
26 Cottage Street
P.O. Box 324
Littleton, NH 03561-0324

RE: Docket No. FAR-14482

RAFAELE L. DEMOULAS, administratrix, & others
vs.
TELEMACHUS A. DEMOULAS & others (and a companion case)

Middlesex Superior Court No. MICV1990-02344
A.C. No. 2003-P-1255

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on 12/23/04, the above-captioned Application for Further Appellate Review was denied. (Sosman, J., recused)

Susan Mellen, Clerk

Dated: December 23, 2004

To: Robert C. Gerrard, Esquire
J. Owen Todd, Esquire
Carol R. Cohen, Esquire
Shepard Davidson, Esquire
Andrea Saunders Batchelder, Esquire
Lawrence G. Green, Esquire
Joseph P. Messina, Esquire
Thomas B. Merritt, Esquire
Atty. Paul M. Wolff

Atty. Barnet Phillips, IV
Richard J. Yurko, Esquire
Thomas J. Dougherty, Esquire
Christine M. Roach, Esquire

APPENDIX D

United States Constitution, amend. 14, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Massachusetts Declaration of Rights, art. 11

Every subject of the Commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

Massachusetts Declaration of Rights, art. 29

It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the rights of the people, and of every citizen, that the judges of the supreme judicial

court should hold their offices as long as they behave themselves well; and that they should receive honorable salaries ascertained and established by standing laws.

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28 U.S.C. § 144

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

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28 U.S.C. § 455

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

> **(1)** Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

GENERAL LAWS OF MASSACHUSETTS

Chapter 211: Section 3 Superintendence of inferior courts; power to issue writs and process

Section 3. The supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided; and it may issue all writs and processes to such courts and to corporations and individuals which may be necessary to the furtherance of justice and to the regular execution of the laws.

In addition to the foregoing, the justices of the supreme judicial court shall also have general superintendence of the administration of all courts of inferior jurisdiction, including, without limitation, the prompt hearing and disposition of matters pending therein, and the functions set forth in section three C; and it may issue such writs, summonses and other processes and such orders, directions and rules as may be necessary or desirable for the furtherance of justice, the regular execution of the laws, the improvement of the administration of such courts, and the securing of their proper and efficient administration; provided, however, that general superintendence shall not include the authority to supersede any general or special law unless the supreme judicial court, acting under its original or appellate jurisdiction finds such law to be unconstitutional in any case or controversy; and provided, further that general superintendence also shall not include the authority or power to exercise or supersede any of the powers, duties and responsibilities of the chief justice for administration and management, as established by section one of chapter two hundred and eleven B, in any general or special law except under extraordinary circumstances leading to a severe, adverse impact on the administration of justice; provided, that the majority of the supreme judicial court shall issue a written order that sets forth the basis for a finding that, absent such action, there would be a severe and adverse impact on the administration of justice in the commonwealth. Nothing herein contained shall affect existing law governing the selection of officers of the courts, or limit the existing authority of the officers thereof to appoint administrative personnel.

APPENDIX E

Massachusetts Supreme Judicial Court Rule 3:09, Canon 3

E. Disqualification

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer; . . .

Massachusetts Appeals Court Rule 1:28 SUMMARY DISPOSITION (Applicable to all cases.)

At any time following the filing of the appendix (or the filing of the original record) and the briefs of the parties on any appeal in accordance with the applicable provisions of Rules 14(b), 18, and 19 of the Massachusetts Rules of Appellate Procedure, a panel of the justices of this court may determine that no substantial question of law is presented by the appeal or that some clear error of law has been committed which has injuriously affected the substantial rights of an appellant and may, by its written order, affirm, modify or reverse the action of the court below. The panel need not provide an opportunity for oral argument before disposing of cases under this rule. Any order entered under this rule shall be subject to the provisions of Rules 27 and 27.1 of the Massachusetts Rules of Appellate Procedure.

Mass. R. Civ. P. 60. RELIEF FROM JUDGMENT OR ORDER

(b) Mistake; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to file for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3), not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. Writs of review, of error, of audita querela, and petitions to vacate judgment are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Mass. R. App. P. 27.1 FURTHER APPELLATE REVIEW

(a) Application; When Filed; Grounds. Within twenty days after the date of the rescript of the Appeals

Court any party to the appeal may file an application for leave to obtain further appellate review of the case by the full Supreme Judicial Court. Such application shall be founded upon substantial reasons affecting the public interest or the interests of justice. Oral argument in support of an application shall not be permitted except by order of the court.

(b) Contents of Application; Form. The application for leave to obtain further appellate review shall contain, in the following order: (1) a request for leave to obtain further appellate review; (2) a statement of prior proceedings in the case (including whether any party is seeking a rehearing in the Appeals Court); (3) a short statement of facts relevant to the appeal (but facts correctly stated in the opinion, if any, of the Appeals Court shall not be restated); (4) a statement of the points with respect to which further appellate review of the decision of the appeals court is sought; and (5) a brief statement (covering not more than ten pages of typing), including appropriate authorities, indicating why further appellate review is appropriate. A copy of the rescript and opinion, if any, of the Appeals Court shall be appended to the application. In addition, if the Appeals Court entered a memorandum and order under Appeals Court Rule 1:28 which refers to another document, such as a brief or judge's findings and rulings, a copy of that document, or, if appropriate, the pertinent pages of that document, shall be appended to the application. The application shall comply with the requirements of Rule 20.

(c) Opposition; Form. Within ten days after the filing of the application, any other party to the appeal may, but need not, file and serve an opposition thereto (covering not more than ten pages of typing) setting forth reasons why

the application should not be granted. The opposition shall not restate matters described in subdivision (b)(2) and (3) of this rule unless the opposing party is dissatisfied with the statement thereof contained in the application. An application shall comply with the requirements of Rule 20.

(d) Filing; Service. One copy of the application and one copy of each opposition shall be filed in the office of the clerk of the Appeals Court. An original and seventeen copies of the application and of each opposition shall be filed in the office of the clerk of the full Supreme Judicial Court. Filing and service of the application and of any opposition shall comply with Rule 13.

(e) Vote for further appellate review; certification. If any three justices of the Supreme Judicial Court shall vote for further appellate review for substantial reasons affecting the public interest or the interests of justice, or if a majority of the justices of the Appeals Court or a majority of the justices of the Appeals Court deciding the case shall certify that the public interest or the interests of justice make desirable a further appellate review, an order allowing the application or the certificate, as the case may be, shall be transmitted to the clerk of the Appeals Court; upon receipt, further appellate review shall be deemed granted. The clerk shall forthwith transmit to the clerk of the full Supreme Judicial Court all papers theretofore filed in the case and shall notify the clerk of the lower court that leave to obtain further appellate review has been granted.

(f) Briefs. Any party may apply to the Supreme Judicial Court within ten days after the date on which the appeal is docketed in the full Supreme Judicial Court for permission to file a new brief. If the application is granted,

the new brief must be filed in accordance with the briefing schedule established by the Clerk of the Supreme Judicial Court, and the court may impose terms as to the length and filing of such brief and any response thereto. If a new brief is filed, it will be considered in lieu of the Appeals Court brief. If permission to file a new brief is denied or not sought, cases in which further appellate review has been granted shall be argued on the briefs filed in the Appeals Court.

(g) Order of Argument. The applicant for leave to obtain further appellate review will argue first unless the court directs or the parties agree otherwise

* * *

APPENDIX F

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT
NOS. 2003-P-1255 and 2003-P-1256 (Consolidated)

RAFAELE LORAINE DEMOULAS, ADMINISTRATRIX OF THE ESTATE OF EVAN G. DEMOULAS and NEXT FRIEND OF VANESSA EVAN DEMOULAS, *et al.*
Plaintiffs-Appellees

v.

TELEMACHUS A. DEMOULAS, *et al.*
Defendants-Appellants.

ARTHUR S. DEMOULAS,
Plaintiff-Appellee

v.

DEMOULAS SUPER MARKETS, INC., *et al.*
Defendants-Appellants.

ON APPEAL FROM AN ORDER OF
THE SUPERIOR COURT OF MIDDLESEX COUNTY
(BRADY, J.)

BRIEF OF THE PLAINTIFFS-APPELLEES ARTHUR S. DEMOULAS, FOTENE J. DEMOULAS, DIANA D. MERRIAM and EVANTHEA DEMOULAS

Robert C. Gerrard/BBO#189800
Carol R. Cohen/BBO#088660
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Dated: February 9, 2004

* * *

ARGUMENT

I. DEFENDANTS' MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO MASS. R. CIV. P. 60(B) IS UNTIMELY

The relief requested by the defendants comes far too late in the game. Defendants' contention, in essence, is that relief from final judgments entered in August 10, 2000 (A.95, stock transfer actions) and March 25, 1999 (A. 184, shareholder derivative action) is warranted because they have unearthed newly discovered evidence of fraudulent conduct at work during these proceedings, namely, the purported bias of the Judge Lopez. In the Defendants' own words, the allegations upon which they ground their request for relief fall squarely within the reasons enumerated in subsections 1-3 of Rule 60(b). Defendants' Brief at 26.

A. Defendants' Motion For Relief From Judgment Is Subject To The One-Year Time Limitation Applicable to Rule 60(b)(1-5).

Defendants' motion for relief from judgment was subject to the one year time restriction imposed by Rule 60(b) and was not eligible for the more forgiving time-frame afforded by the catchall provision of Rule 60(b)(6). Rule 60(b) enables a court to relieve a party from a final judgment, in the event of

> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> . . .
>
> (6) any other reason justifying relief from the operation of the judgment.

With regard to subsection 6, Rule 60(b) mandates: "[t]he motion shall be made within a reasonable time, and for reasons (1), (2), and (3) *not more than one year* after the judgment, order or proceeding was entered or taken." (Emphasis added).

"[R]elief under rule 60(b)(6) is only appropriate when justified by some reason other than those set forth in rule 60(b)(1)-(5)." *Id.* at 407 (citing *Bromfield v. Commonwealth*, 400 Mass. 254, 256 (1987); "In other words, to prevail under rule 60(b)(6), a party must show that there is a reason to justify the relief, *and also that the reason is not within the grounds set forth in rule 60(b)(1)-(5).*"

Where a litigant moves for relief from judgment due to newly discovered evidence of fraud during the proceedings, the motion "clearly fall[s] within subsections (2) and (3) of rule 60(b)" and is, accordingly, not actionable under Rule 60(b)(6). *Sahin v. Sahin*, 435 Mass. 396, 406 (2001). Because motions for relief from judgment on the basis of newly discovered evidence of a fraud during the proceeding "are not requests for relief independent of subsections (b)(1)-(5)", they are plainly subject to the one-year time restriction applicable to Rule 60(b)(1-3). *Id. See also Honer v. Wisniewski*, 48 Mass. App. Ct. 291, 295 (1999) ("Rule 60(b)(6) cannot be used to extend the one-year limitation applicable to rule 60(b)(1) or (b)(3).") (collecting authority); *In re Paternity of Cheryl*, 434 Mass. 23, 35 (2001). The

Supreme Judicial Court's application of this rule in *Sahin* demonstrates amply that the one-year limitation runs *from the date of the entry of judgment complained of, and not from the date of discovery of the fraud or new evidence. See id.* (denying 60(b) relief to spouse who discovered evidence of husband's fraud during course of divorce proceedings more than one year after the entry of judgment). *United States v. Pungitore*, a case decided by the U.S. District Court sitting in the Eastern District of Pennsylvania, is directly on point. There, a litigant moved, five years following the denial of his petition for habeas relief, for relief from judgment under Fed.R.Civ.P. 60(b)(6) on the ground that he had only recently discovered evidence that the judge who presided over his trial was biased. *See United States v. Pungitore*, 2003 WL 22657087 * 6 (E.D.Pa. Oct 24, 2003).

The defendants' contention in the present case, that they have only recently discovered evidence of Judge Lopez' bias, some three and four years after entry of the respective judgments, is a claim which is properly brought pursuant to subsection 2 of Rule 60(b) and is accordingly subject to its one year time limit.

B. The Relief Sought By Defendants Falls Under Subsections 1-3 Of Rule 60(b) And Is Subject To A One-Year Time Limitation.

The defendants do not dispute that the relief which they seek falls under clauses 1-3 of Rule 60(b). Defendants acknowledge on page 26 of their brief that the facts upon which they seek relief from judgment fall squarely within the grounds specified by subsections 1-3 of Rule 60(b). Defendants' Brief at p. 26. Specifically, defendants state:

> Several grounds specified in Rule 60(b) apply to the facts in this case – 60(b)(1), surprise; 60(b)(2), newly discovered evidence which by due diligence could not have been discovered; 60(b)(3), fraud; and 60(b)(6), any other reason justifying relief from the operation of the judgment.

Id. at 26-27. Defendants acknowledgement that the alleged facts upon which they seek 60(b) relief, namely the newly discovered evidence of Judge Lopez' supposed bias against them, falls within the scope of subparagraphs one, two, and three of Rule 60(b), subjects their request for relief to the one-year limitation period. *See, e.g., Sahin*, 435 Mass. at 406. As noted above, the judgments from which defendants seek relief date back to 1999 and 2000, respectively, and lie far beyond the one-year time limitation imposed by Rule 60(b). Therefore, by operation of Rule, defendants' motion for relief from judgment was untimely and was appropriately denied by Judge Brady.

* * *

III. DEFENDANTS' MOTION FOR RECUSAL, AND AN EVIDENTIARY HEARING HAS ALREADY BEEN DECIDED AND AFFIRMED AND THE DECISION IS NOW THE LAW OF THE CASE

The defendants bring to this appeal nothing new, it being merely a reprise of stale allegations that have already been considered by the trial court and which have been rejected by the SJC in previous appeals. The defendants contend that what is new is the revelation in the SJC hearing that Judge Lopez believed that the defendants were hostile to her and hence were her enemies. When the SJC considered the defendants appeal in *Demoulas IV*, which featured the Paul Walsh ruse as the

centerpiece of the motion to recuse, they were made aware that the defendants were so determined to attack the results of the previous cases that they would create a cruel and elaborate hoax in an attempt to gain damaging evidence to use against her. However this hostility may be characterized, the SJC was aware of it and nonetheless remanded the case back to Judge Lopez.

The defendants' entire argument is essentially premised on one isolated word, "enemies". It is the single thread they pull upon hoping, long after the fact, to unravel thirteen years of litigation resulting in affirmed adverse judgments against them. In the JCC hearings her use of the word "enemies" was qualified and guarded:

> Q. So is it your feeling Judge that you have enemies out there not just from the Demoulas case but others who may have filed fictitious complaints
>
> A. I wouldn't say enemies, but people who may not be happy with certain decisions I have made. But the Demoulas case is certainly the biggest I have dealt with.

A. 900.

Later in Mr. Ware's examination of Judge Lopez she reminds Mr. Ware that "enemies" is a "word you like to use." A. 903.

The recognition of the fact you have an enemy is, of course, not the same as being an enemy and for a judge an awareness that litigants have attacked you personally to overturn adverse decisions cannot, as the defendants insist, "compel" a conclusion of bias. *Defendants' Brief* at 4. *In re WHET*, 33 B.R. 424, 436-37 (d. Mass. 1983); *United*

States v. Grismore 564 F.2d 972 (10th Cir 1977). The SJC has at least implicitly recognized as much in three previous motions to recuse Judge Lopez.

The Court in *Demoulas IV* noted that the first recusal motion was filed in 1994 before the commencement of the derivative action and after the judge had presided over the jury trial in the stock transfer case. It was based upon the fact that the judge had to be biased because she had heard the evidence in the stock transfer case and many of the same witnesses would appear in the derivative case. On appeal the SJC ruled that, if there were any bias, it was judicial bias and not a basis for recusal and thus affirmed the trial court decision. *Demoulas I* at 524.

In *Demoulas IV*, 432 Mass. 43, despite the defendant's urging that the Court consider the affidavits arising out of the disgraceful and hapless ruse involving Judge Lopez' clerk and likewise consider the cumulative affect of their previous unsuccessful recusal motions, the Court ruled:

> We decline to revisit the allegations that supported the first and second motions to recuse. The issues relative to those allegations have previously been considered and they have been decided adversely to the defendants at both the trial and appellate level.

Id. (citing *see, Demoulas III* supra at 557 n.4; *Demoulas II*, supra at 524-526; *Demoulas I*, supra at 524-526).

With regard to the motions considered in *Demoulas IV* the Court affirmed their denial, noting once again that the motions were untimely without excuse or justification and that the affidavits supporting them were legally insufficient. *Demoulas IV* at 54.

Finally, the Court ruled that the defendant children's claim that Judge Lopez was in fact "adverse" to Arthur T. because he had filed complaint against the judge with the JCC was completely unsupported. There was no showing that the complaint caused the judge to be biased or prejudiced against him. *Demoulas IV* at 55.

In *Demoulas IV*, then the SJC considered the whole array of charges brought by the defendants and found them all to be baseless, lacking any evidence that Judge Lopez was adverse to or was harboring any ill will against the defendants. However, neither Judge Lopez nor the SJC could have been mindless that the repeated attacks upon the integrity of the judge made the defendants adverse to her decisions and that, given the Paul Walsh affair they would not scruple to employ trickery and deceit to overturn them. Thus, it could not have been lost on the SJC that the defendants were acting in a way that gave the clear impression that they were "enemies" of the court and the decision it had rendered "in accordance with our laws, fairly decided." A at 905. The fact that the Demoulas defendants were Judge Lopez' enemies and that she was aware that that they were, could not have been a surprise to anyone, even remotely involved in these cases. When the defendants lured the judge's clerk out of the country with the hope that they could trick him into damaging revelations, they clearly established their status as enemies of, not just Judge Lopez, but of the whole judicial process. After the defendants had the effrontery to move, for the third time, to recuse Judge Lopez based upon allegations arising out the deception practiced upon her clerk, their appeal of her refusal to the SJC brought the issue of their enmity glaringly before the Court. *Demoulas IV* at 46-55. The question of whether Judge Lopez was

biased against the defendants because they were hostile to her has been decided against the defendants and is now the law of the case. *King v. Globe Newspaper Co.*, 400 Mass. 705, 707 (1987).

* * *

APPENDIX G

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss. Superior Court
Department of the Trial Court

ARTHUR S. DEMOULAS, Plaintiff, vs. DEMOULAS SUPER MARKETS, INC. VALLEY PROPERTIES, INC., MARKET BASKET, INC. DORIC DEVELOPMENT CORPORATION, LEE DRUG, INC., and TELEMACHUS A. DEMOULAS, IRENE DEMOULAS, ARTHUR T. DEMOULAS, FRANCES D. KETTENBACH, GLORIANNE D. FARNHAM, and CAREN D. PASQUALE, Individually and As They Are General Partners of 231 Realty Associates, Defendants.	CIVIL ACTION NO. 90-2927(B)
RAFAELE LORAIN DEMOULAS, ADMINISTRATRIX OF THE ESTATE OF EVAN G. DEMOULAS and NEXT FRIEND OF VANESSA EVAN DEMOULAS, DIANA D. MERRIAM, FOTENE DEMOULAS, ARTHUR S. DEMOULAS and EVANTHEA DEMOULAS, Plaintiffs, vs.	CIVIL ACTION NO. 90-2344(B)

TELEMACHUS DEMOULAS, ARTHUR T. DEMOULAS, FRANCES D. KETTENBACH, GLORIANNE D. FARNHAM, CAREN D. PASQUALE and DEMOULAS SUPER MARKETS, INC.,

Defendants.

EMERGENCY MOTION OF DEENDANTS [sic], TELEMACHUS A. DEMOULAS, IRENE DEMOULAS, ARTHUR T. DEMOULAS, FRANCES D. KETTENBACH, GLORIANNE D. FARNHAM AND CAREN D. PASQUALE, FOR RELIEF FROM JUDGMENT PURSUANT TO MASS. R. CIV. P. 60(b) AND REQUEST FOR EVIDENTIARY HEARING

The defendants, Telemachus A. Demoulas, Irene Demoulas, Arthur T. Demoulas, Frances D. Kettenbach, Glorianne D. Farnham and Caren D. Pasquale (hereinafter collectively referred to as the "Demoulas defendants"), hereby seek relief from the judgments entered in these actions based upon the trial court's violation of Canon 3(C) of the Code of Judicial Conduct, which provides that "[a] judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where (a) he has a personal bias or prejudice concerning a party . . . " S.J.C. Rule 3:09, Canon 3(C)(1). Judge Lopez's recent testimony before the Judicial Conduct Commission establishes that she has been harboring a personal bias or prejudice against the Demoulas defendants (whom she described as her "enemies") since at least either November 1996 or June 1997 and most likely as early as 1994. However, in response to the Demoulas defendants previous motions to recuse, this judge represented that she was not biased or prejudiced

against the Demoulas defendants and refused to recuse herself. The Demoulas defendants were thereby deprived of their Constitutional right to a "fair trial in a fair tribunal." *In re Murchison,* 349 U.S. 133, 136 (1955). As "the impartial functions of the Court have been directly corrupted," *In re Tri-Cran, Inc.,* 98 B.R. 609, 615-616 (D. Mass. 1989), a fraud on the court has occurred.

For reasons more fully set forth in the memorandum submitted herewith, the Demoulas defendants respectfully request that, pursuant to Mass. R. Civ. P. 60(b), the Court restore the integrity of the judicial process in this case by (1) removing Judge Lopez as the presiding officer; (2) vacating all decisions entered by Judge Lopez after at least June 1997; (3) ordering a hearing to determine when Judge Lopez's partiality, within the meaning of Canon 3(C), first arose; and (4) granting appropriate relief for events occurring before June 1997, once the record of the judge's misconduct has been fully established.

ARTHUR T. DEMOULAS,
GLORIANNE D. FARNUM [sic] and
CAREN D. PASQUALE,
By their attorney,

/s/ Rudolph F. Pierce
Rudolph F. Pierce, BBO# 399380
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TELEMACHUS A. DEMOULAS and
IRENE DEMOULAS,
By their attorney,

/s/ Andrea S. Barisano/mm
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FRANCES D. KETTENBACH,
By her attorney,

/s/ Robert L. Kirby/mm
Robert L. Kirby, Jr., BBO#550538
Nixon Peabody LLP
101 Federal Street
Boston, MA 02110
(617) 345-1000

Dated: April 9, 2003

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each party by mail (by hand) on 4-9-03

/s/ Rudolph F. Pierce

APPENDIX H

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss. Superior Court
Department of the Trial Court

ARTHUR S. DEMOULAS, Plaintiff, vs. DEMOULAS SUPER MARKETS, INC. VALLEY PROPERTIES, INC., MARKET BASKET, INC. DORIC DEVELOPMENT CORPORATION, LEE DRUG, INC., and TELEMACHUS A. DEMOULAS, IRENE DEMOULAS, ARTHUR T. DEMOULAS, FRANCES D. KETTENBACH, GLORIANNE D. FARNHAM, and CAREN D. PASQUALE, Individually and As They Are General Partners of 231 Realty Associates, Defendants.	CIVIL ACTION NO. 90-2927(B)

RAFAELE LORAIN DEMOULAS, ADMINISTRATRIX OF THE ESTATE OF EVAN G. DEMOULAS and NEXT FRIEND OF VANESSA EVAN DEMOULAS, DIANA D. MERRIAM, FOTENE DEMOULAS, ARTHUR S. DEMOULAS and EVANTHEA DEMOULAS, Plaintiffs, vs.	CIVIL ACTION NO. 90-2344(B)

TELEMACHUS DEMOULAS, ARTHUR T. DEMOULAS, FRANCES D. KETTENBACH, GLORIANNE D. FARNHAM, CAREN D. PASQUALE and DEMOULAS SUPER MARKETS, INC.,

Defendants.

MEMORANDUM IN SUPPORT OF THE DEFENDANTS' EMERGENCY MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 60(b)(6) AND REQUEST FOR EVIDENTIARY HEARING

* * *

Here, the judge's own testimony and conduct demonstrate a consuming bias which casts significant doubt on her ability to rule impartially in these cases. It, therefore, cannot be reasonably disputed that the judge's bias is the sort of extreme, deep-seated and pervasive bias which the Supreme Court held required recusal in *Liteky v. U.S.*, 510 U.S. 540, 551 (1994).

* * *

Although the judge's ability to render fair and impartial decisions in these cases was corrupted by her bias, she nonetheless refused to recuse herself and, as a result, deprived the Demoulas defendants – her "enemies" – of their Federal and state Constitutional right to have the remaining matters in these cases decided by an impartial judge. "The fundamental law of the Commonwealth is that '[i]t is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit.'" *King v. Grace,* 293 Mass. 244, 246 (1936), *quoting* Art. 29 of the Declaration of Rights of the Constitution.

See MacDonald, supra, 407 Mass. at 203 ("[T]he right to an impartial decision-maker is required by due process' "), *quoting Arnett v. Kennedy,* 416 U.S. 134, 197, 94 S.Ct. 1633, 1665 (1974) (White, J., concurring in part and dissenting in part), and *citing Goldberg v. Kelly,* 397 U.S. 254, 271, 90 S.Ct. 1011, 1022 (1970) (an impartial decision maker is essential). *Cf. Walberg v. Israel,* 766 F.2d 1071, 1077 (7th Cir. 1985) ("the judge who is so hostile to a lawyer as to doom the client to defeat deprives the client of the right to an impartial tribunal").

* * *

Justice requires "'[a] fair trial in a fair tribunal.'" *Craven v. State Ethics Com'n,* 390 Mass. 191, 197 (1983) (quoting *In re Murchison,* 349 U.S. 133, 136 (1955)). "It is well-settled that the Due Process Clause [of the Fourteenth Amendment] prevents the state from depriving a plaintiff of a protected property interest without 'a fair trial in a fair tribunal.'" *Stivers v. Pierce,* 71 F.3d 732, 741 (9th Cir. 1995). "'*Fairness of course requires an absence of actual bias* in the trial of cases.'" *Commonwealth v. Howard,* 367 Mass. 569, 572 (1975) (emphasis added) (quoting *In re Murchison, supra,* 349 U.S. at 136). A party may establish that "he has been denied his constitutional right to a fair hearing before an impartial tribunal . . . [where] the proceedings and surrounding circumstances . . . demonstrate *actual* bias on the part of the adjudicator." *Stivers v. Pierce,* 71 F.3d at 741.[21] By harboring a bias

[21] The judge's conduct denied the defendants rights guaranteed by the Due Process Clause and, therefore, the Demoulas defendants raise this federal issue in order to ensure that whatever rights they have are properly preserved. *Cf. Roy v. City of Augusta,* 712 F.2d 1517 (1st Cir. 1983) ("Where a party should reasonably foresee that an adverse state

(Continued on following page)

against the defendants strong enough to consider them her "enemies" and to feel "persecuted" by them, the judge has robbed the defendants, at least since 1997 (and most likely as early as 1994), of their right to a fair administration of their cases by an impartial court. *See Margoles v. Johns,* 660 F.2d 291, 296 (7th Cir. 1981) ("A litigant is denied the fundamental fairness to which he is constitutionally entitled if the judge of his case is unfairly biased against him").

* * *

VII. CONCLUSION

"Courts should not forfeit truth for the sake of finality." *Leber-Krebs, Inc. v. Capitol Records,* 779 F.2d at 901. Accordingly, the defendants respectfully request that, pursuant to Mass. R. Civ. P. 60(b), the Court restore the integrity of the judicial process in this case by (1) removing Judge Lopez as the presiding officer; (2) vacating all decisions entered by Judge Lopez after June 1997; (3) ordering a hearing to determine when it could reasonably be said that Judge Lopez's partiality, within the meaning of Canon 3(C), began; and (4) granting appropriate relief for events occurring before June 1997, once the record of the judge's misconduct has been fully established.

ARTHUR T. DEMOULAS,
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---

court judgment will create a constitutional issue, that issue should be argued before the state court").

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each party by mail (by hand) on 4-9-03

/s/ Rudolph F. Pierce

APPENDIX I

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT
NOS. 2003-P-1255 and 2003-P-1256 (Consolidated)

RAFAELE LORAINE DEMOULAS, ADMINISTRATRIX OF THE ESTATE OF EVAN G. DEMOULAS and NEXT FRIEND OF VANESSA EVAN DEMOULAS, *et al.*,
Plaintiffs-Appellees

v.

TELEMACHUS A. DEMOULAS, *et al.*,
Defendants-Appellants.

ARTHUR E. DEMOULAS
Plaintiff-Appellee

v.

DEMOULAS SUPER MARKETS, INC., *et al.*
Defendants-Appellants.

ON APPEAL FROM AN ORDER OF THE
SUPERIOR COURT OF MIDDLESEX COUNTY
(BRADY, J.)

Brief of the Defendants-Appellants Telemachus Demoulas, Irene Demoulas, Arthur T. Demoulas, Frances D. Kettenbach, Glorianne D. Farnham and Caren D. Pasquale

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* * *

Dated: December 10, 2003

ARGUMENT

I. OVERVIEW

Fundamental to the American system of justice is the notion of "fairness." A key element of that notion is the "impartiality" of the judge or arbiter of the judicial or administrative proceeding. "The right to trial by an impartial judge 'is a basic requirement of due process'." *See U.S. v. Haines*, 975 F2d 81, 98 (3rd Cir. 1992), quoting *In re Murchison*, 349 U.S. 133, 136 (1955). Indeed, art. 29 of the Massachusetts Declaration of Rights explicitly states judges are to be "as 'free, impartial, and independent as the lot of humanity will admit'." *See Parenteau v. Jacobson*, 32 Mass. App. Ct. 97, 99 (1992). This concept of "impartiality" is codified in Canon 3 of the Rules of the Supreme Judicial Court entitled "A Judge Should Perform the Duties of His Office Impartially and Diligently."

* * *

III. THE TRIAL COURT'S REFUSAL TO GRANT DEFENDANTS ANY FORM OF RELIEF, DESPITE JUDGE LOPEZ'S EXTRAORDINARY ADMISSION OF HER HOSTILITY TOWARD THEM, WAS AN ABUSE OF DISCRETION

A. Due Process and the Impartiality of the Trial Judge

The right to due process of law, guaranteed by our state and federal constitutions, requires that court proceedings be presided over by a fair and impartial decision-maker. *See, e.g., Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (applying the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution); *King v. Grace*, 293 Mass. 244, 246 (1936) (applying Article 29 of the Declaration of Rights of the Massachusetts Constitution).[13] In implementing this requirement, the Supreme Judicial Court has made clear that a judge may not preside over a case when, under an objective appraisal of the facts, her impartiality might reasonably be called into question. S.J.C. Rule 3:09; Mass. Code of Judicial Conduct, Canon 3(C)(1), *see Demoulas*, 428 Mass. at 545 n.6; *Haddad v. Gonzalez*, 410 Mass. 855, 862 (1991); accord *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 848 (1988). Thus, even when a judge subjectively believes

---

[13] See *also MacDonald v. MacDonald*, 407 Mass. 196, 203 (1990) (" 'the right to an impartial decision-maker is required by due process' ") (quoting *Arnett v. Kennedy*, 416 U.S. 134, 197 (1974) (White, J. concurring in part and dissenting in part)); *King*, 293 Mass. at 246 (holding that "[t]he fundamental law of the Commonwealth is that it is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit"); cf. *Stivers v. Pierce*, 71 F.3d 732, 741 (9th Cir. 1995) (holding that the Due Process Clause of the Fourteenth Amendment "prevents the state from depriving a plaintiff of a protected property interest without 'a fair trial in a fair tribunal' ").

in her own freedom from bias, recusal is required when the circumstances would lead an objective observer to question the accuracy of her belief. *Parenteau, supra,* 32 Mass. App. Ct. at pp. 102-04 (1992); accord *Cameron v. Cameron*, 444 A.2d 915, 919 (Conn. Super. Ct. 1982) (observing that "[p]roof of actual bias is not required for disqualification" because "[t]he appearance as well as the actuality of impartiality on the part of the trier is an essential ingredient of a fair trial," and holding that recusal was required where "[t]he record . . . disclose[d] a situation 'which inevitably raises in the minds of litigants . . . a suspicion as to the fairness of the court's administration of justice'") (quoting *Krattenstein v. G. Fox* & Co., 236 A.2d 466, 469 (Conn. 1967)).

The need for an objective as well as subjective determination of the judge's impartiality is grounded not only in the litigants' constitutional right to due process, but also in the public's right to judicial system in which it can have confidence. *See, e.g., In re Antar*, 71 F.3d 97, 101 (3d Cir. 1995); *United States v. Bosch*, 951 F.2d 1546, 1557 (9th Cir. 1991). Whatever the judge's actual feelings may be, when the circumstances are such that an objective, knowledgeable member of the public can reasonably question the judge's impartiality, public confidence in the judicial system – upon which the viability of that system depends – is threatened. *See Liljeberg,* 486 U.S. at 848; *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155, 162 (3d Cir. 1993). Thus, as the Supreme Court observed in *Marshall,* providing litigants with both the "appearance and [the] reality of fairness" is of crucial importance to our system of justice. 446 U.S. at 242; *See also Offutt v. United States,* 348 U.S. 11, 14 (1954) (observing that "justice must satisfy the appearance of justice").

* * *

Respectfully submitted,

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APPENDIX J

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT
NOS. 2003-P-1255 and 2003-P-1256 (Consolidated)

RAFAELE LORAINE DEMOULAS, ADMINISTRATRIX OF THE ESTATE OF EVAN G. DEMOULAS and NEXT FRIEND OF VANESSA EVAN DEMOULAS, et al.,
Plaintiffs-Appellees

v.

TELEMACHUS A. DEMOULAS, et al.,
Defendants-Appellants.

ARTHUR S. DEMOULAS
Plaintiff-Appellee

v.

DEMOULAS SUPER MARKETS, INC., et al.
Defendants-Appellants.

ON APPEAL FROM AN ORDER OF THE
SUPERIOR COURT OF MIDDLESEX COUNTY
(BRADY, J.)

Reply Brief of the Defendants-Appellants Telemachus Demoulas, Irene Demoulas, Arthur T. Demoulas, Frances D. Kettenbach, Glorianne D. Farnham and Caren D. Pasquale

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* * *

Stripped to its essence, due process means, among other things, that a litigant should not have to bear the weight of suspicion as to whether the judge before whom he appears is fair and impartial. *Cf. Cameron v. Cameron*, 444 A.2d 915, 919 (Conn. Super Ct. 1982). The United States Supreme Court made this point plain in *Marshall* v. *Jerrico* 446 U.S. 238, 242 (1980), when it said that "the neutrality requirement helps to guarantee that life, liberty or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. At the same time, it preserves both the appearance and the reality of fairness. . . ." Accordingly, whenever it becomes clear or the judge reveals that she can no longer be fair and impartial, the law requires recusal.

Additionally, the courts are particularly sensitive to this requirement when the judge, as here, is trying the

cause without a jury. "[W]hen the judge is the actual trier of fact, the need to preserve the appearance of impartiality is especially pronounced." *Alexander* v. *Primerica Holdings, Inc.* 10 F.2d [sic] 155, 166 (3rd Cir. 1993).

* * *

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APPENDIX K

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

No. _____

MIDDLESEX, SS.

APPEALS COURT
NO. 03-P-1255

RAFAELE L. DEMOULAS,
administratrix, & others,
Plaintiff-Appellees

v.

TELEMACHUS A. DEMOULAS & others,
Defendants-Appellants

(and a companion case)

REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

The defendant-appellant Frances D. Kettenbach respectfully requests pursuant to Mass. R. App. P 27.1, as amended through 434 Mass. 1601 (2001), that this Honorable Court grant her leave to obtain further appellate review of the above-captioned case following the rescript of the Appeals Court dated October 26, 2004. *Demoulas* v. *Demoulas,* 62 Mass. App. Ct. 1107 (2004). In support of this request, the applicant, a daughter of Telemachus Demoulas, states that substantial reasons affecting the public interest and the interests of justice mandate further appellate review of the issues raised on appeal. This appeal challenges the constitutionality of the entire

Massachusetts jurisprudence governing recusal of judges. It requires decision by the Commonwealth's highest court.

* * *

STATEMENT OF THE POINTS WITH RESPECT TO WHICH FURTHER APPELLATE REVIEW OF THE DECISION OF THE APPEALS COURT IS SOUGHT

* * *

(c) Massachusetts recusal jurisprudence is unconstitutional because it protects a biased, or even a corrupt, judge, rather than protecting the rights secured to a litigant by the Massachusetts Declaration of Rights, arts. 11 and 29, and by the United States Constitution, amend. 14, § 1.

ARGUMENT

* * *

C. THE TWO-PRONG TEST FOR DISQUALIFICATION OF A JUDGE, APPLIED IN EARLIER DECISIONS OF THIS COURT, IS UNCONSTITUTIONAL BECAUSE IT ABRIDGES RIGHTS SECURED TO A LITIGANT BY BOTH THE UNITED STATES CONSTITUTION AND THE CONSTITUTION OF THE COMMONWEALTH

This appeal has relatively little to do with Judge Lopez and the other personalities in these protracted cases. It has everything to do with the State and Federal Constitutions. The facts compellingly illustrate the need for the Commonwealth's highest Court to examine the constitutional validity of the recusal procedure articulated

in *Lena* v. *Commonwealth,* 369 Mass. 571, 575 (1976), and *Haddad* v. *Gonzalez,* 410 Mass. 855, 862 (1991). In *Lena, ibid.,* Justice Kaplan, writing for the Court, stated:

> "Faced, then, with a question of his capacity to rule fairly, the judge was to consult first his own emotions and conscience. If he passed the internal test of freedom from disabling prejudice, he must next attempt an objective appraisal of whether this was 'a proceeding in which his impartiality might reasonably be questioned.' S.J.C. Rule 3:25 Canon 3(C)(1)(a) [382 Mass. 811 (1980)]."[1]

Such determinations are reviewed under the deferential "abuse of discretion" standard. *Demoulas II,* 428 Mass. at 546.

This case raises the fundamental question of the role of appellate courts in protecting the constitutional rights of a litigant in the Commonwealth to have his case heard "by judges as free, impartial and independent as the lot of humanity will admit," Massachusetts Declaration of Rights, art. 29, to the end that he "find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character," *id.,* art. 11. "These constitutional guarantees have been rigidly enforced." *King* v. *Grace,* 293 Mass. 244, 246 (1936). Federal guarantees are also implicated. The right of litigants to a fair trial by a fair tribunal in State courts

---

[1] "(C) Disqualification

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has personal bias or prejudice concerning a party. . . . "

is secured by the due process guarantee of the Fourteenth Amendment to the United States Constitution. *Stivers* v. *Pierce,* 71 F.3d 732, 741 (9th Cir. 1995). *Ward* v. *Monroeville,* 407 U.S. 57 (1972). In economic matters, this Court recognizes "little difference" between State and Federal due process standards. *Klein* v. *Catalano,* 386 Mass. 701, 707 n. 6 (1982). The recusal procedure established by this Court in the *Lena* and *Haddad* decisions does not meet these stern constitutional tests.

While our system of justice has historically granted trial judges broad discretion in determining whether their recusal is required by actual bias or the appearance of bias, that exercise of discretion is subject to appellate review. Such review, however, is meaningful only if there is an adequate record in the trial court as well as a full and fair opportunity to develop such a record. This is the essence of the constitutional guarantees at issue in the present case. This Court has stated that, for evidence of bias to be sufficient,

> "the affidavits must set forth facts, including the time, place, persons, and circumstances, and, where based on an extra-judicial statement of the judge, the substance of that statement."

Demoulas IV, 432 Mass. at 53. The time, place, persons, and circumstances are now embodied in Judge Lopez's sworn testimony, see pp. 4-5, *supra,* which unmistakably demonstrates paranoia, bias, and partiality. Due process principles require that the defendants be afforded a hearing to determine the extent of her bias, how and when it developed.

Judge Lopez denied the defendants their basic due process right to call and examine witnesses on the factual

questions critical to the issue of recusal. Both this Court and the Appeals Court nevertheless affirmed the denial of recusal motions in reliance upon Judge Lopez's statements that she had examined her conscience and could decide the case impartially. See *Demoulas II,* 428 Mass. at 545; Appeals Court order, *infra,* p. 20. As the facts developed in the CJC proceedings demonstrate, however, Judge Lopez's statements may well have been incomplete, inaccurate, and false when made.

The integrity of our system of justice and the public's perception of its integrity require fair and impartial judges. *Matter of Brown,* 427 Mass. 146, 149 (1998) ("Surely it is arrogance to say . . . that we may not seem impartial, but we know we are"). In this case, that integrity as well as the appearance of integrity can only be assured by a full and fair hearing where the questions surrounding Judge Lopez's bias are fully explored. Unfortunately, such a hearing was denied, initially by Judge Lopez and later by the motion judge. The motion judge's ruling followed new disclosures by Judge Lopez herself concerning her bias. These new disclosures, displaying enmity and paranoia, raised disturbing questions about judicial bias and the appearance of bias.

Self-analysis by a manifestly biased judge is impossible. Simply to trust the integrity of the trial judge rests on an assumption fundamentally flawed, if the judge is already partial. The decision of such a judge, who simply recites the formula of *Lena* and *Haddad,* can rise no higher than its source. Current Massachusetts recusal jurisprudence protects the judge who chooses bias but is

willing to make this recitation.[2] Even a corrupt judge would be protected. The present case presents the paradigm example, happily rare, of a judge who did not possess the qualities expected by this Court. See *e.g.*, *Matter of DeSaulnier,* 360 Mass. 757 (1971); *Matter of Troy,* 364 Mass. 15 (1973); *Matter of Bonin,* 375 Mass. 680 (1978). The need for an objective as well as a subjective determination of a judge's impartiality is grounded not only in the litigants' constitutional right to due process, but also in the public's right to a judicial system in which it can have confidence. There is now sufficient evidence of Judge Lopez's bias to require a hearing, to determine, by a preponderance of the evidence, whether her bias and partiality affected the outcome of this case.

No previous appellate consideration of this case has appraised the constitutionality of the recusal test.[3] It is essential to the public's continued confidence in the judiciary that this Court reexamine the recusal procedure in light of its constitutional dimension. Furthermore, from the CJC proceedings against Judge Lopez, there is now sufficient new evidence to require a hearing to determine whether bias and partiality pervaded her decisions.

---

[2] Moreover, for any person to be the judge in his own cause is contrary to one of the oldest usages of the common law. *Bonham's Case,* 8 Co. Rep. 114a, 77 Eng. Rep. 647 (C.P. 1610).

[3] It would not have been the function of the Appeals Court to alter an established rule of law. *Burke* v. *Toothaker,* 1 Mass. App. Ct. 234, 239 (1973).

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court accept this matter for further appellate review.

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Supreme Court, U.S.
FILED
MAY 18 2005
OFFICE OF THE CLERK

No. 04-1257

In The
Supreme Court of the United States

FRANCES D. KETTENBACH,

Petitioner,

v.

RAFAELE LORAIN DEMOULAS, ADMINISTRATRIX OF THE ESTATE OF EVAN G. DEMOULAS AND NEXT FRIEND OF VANESSA EVAN DEMOULAS, DIANA D. MERRIAM, FOTENE J. DEMOULAS, ARTHUR S. DEMOULAS AND EVANTHEA DEMOULAS,

Respondents.

On Petition For A Writ Of Certiorari To The Appeals Court For The Commonwealth Of Massachusetts

BRIEF OF RESPONDENT, RAFAELE LORAIN DEMOULAS, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

Frances Kettenbach ("Ms. Kettenbach") waited until beyond the eleventh hour, after even the stroke of midnight, to raise her claim that the Commonwealth of Massachusetts' procedure for judicial consideration of a litigant's motion to recuse the presiding judge violates her due process rights under the United States Constitution. Ms. Kettenbach's Petition for a Writ of Certiorari should be denied because she waived this argument by not submitting it in a timely manner in the proceedings below, which included repeated recusal motions to the Massachusetts Superior Court and no fewer than three separate appeals to the Massachusetts Supreme Judicial Court.

Her Petition also should be denied for the separate and independent reason that the Massachusetts recusal procedure does not violate her due process rights, but rather is similar on the challenged point to the Federal procedure which has been held to exceed constitutional requirements. This is particularly true where Ms. Kettenbach's most recent recusal motion was considered – and denied – by a judge other than the one whom she challenged.

Further, despite Ms. Kettenbach's contention, there is no evidence of an existing "conflict among state courts" warranting review by this Court, and for this reason, too, her Petition should be denied.

ARGUMENT

I. MS. KETTENBACH WAIVED HER PURPORTED CONSTITUTIONAL CLAIM.

Ms. Kettenbach waived her argument that the Massachusetts procedure for determining recusal motions is unconstitutional. She did not raise that argument until after the successive recusal motions she and her co-defendants had submitted to the Massachusetts Superior Court had been reviewed by the Massachusetts Supreme Judicial Court three separate times. *See Demoulas v. Demoulas Super Markets, Inc.*, 424 Mass. 501, 524-26 (1997); *Demoulas v. Demoulas Super Markets, Inc.*, 428 Mass. 453 (1998); *Demoulas v. Demoulas*, 432 Mass. 43, 45-55 (2000).

Neither Ms. Kettenbach, nor any of her co-defendants, raised the constitutional argument she advances in her Petition for a Writ of Certiorari to the Massachusetts Superior Court in connection with their repeated recusal motions. None of them raised that issue in any of their prior serial appeals to the Massachusetts Supreme Judicial Court. None of them raised it in their appeal to the Massachusetts Appeals Court[1] of the Superior Court's most recent recusal decision, which in fact was issued by a different judge than the one challenged. Rather, the first time Ms. Kettenbach made the argument was in her application to the Massachusetts Supreme Judicial Court for further appellate review – a decade after her first recusal motion was denied.

---

[1] The Massachusetts Appeals Court is the State's intermediate appellate tribunal.

For these reasons, Ms. Kettenbach is deemed to have waived her constitutional challenge to the Massachusetts recusal procedure set forth in *Haddad v. Gonzalez*, 410 Mass. 855, 862 (1991), and *Lena v. Commonwealth*, 369 Mass. 571, 579 (1991). "The general rule is that an issue not raised in the trial court cannot be argued for the first time on appeal." *M.H. Gordon & Son, Inc. v. Alcoholic Bevs. Control Comm'n*, 386 Mass. 64, 67 (1982). The waiver doctrine "applies equally to constitutional claims." *Commonwealth v. Watson*, 409 Mass. 110, 112 (1991), *quoting Commonwealth v. Deeran*, 397 Mass. 136, 139 (1986); *see Commonwealth v. Amirault*, 424 Mass. 618, 639 (1997); *Commonwealth v. Cote*, 386 Mass. 354, 358-59 n.6 (1982).

II. THE MASSACHUSETTS RECUSAL PROCEDURE DOES NOT VIOLATE THE DUE PROCESS CLAUSE.

The Massachusetts recusal procedure set forth in *Haddad* and *Lena* does not violate the due process clause of the United States Constitution.

Ms. Kettenbach incorrectly contends that the "self-analysis" required by the Massachusetts authority is fundamentally flawed because the judge accused of bias is the one conducting that analysis. Petition, p. 13. That argument is immaterial here, since Ms. Kettenbach's and her co-defendants' most recent recusal motion, which was dressed as a Massachusetts Rule of Civil Procedure 60(b) motion,[2]

[2] Massachusetts Rule of Civil Procedure 60(b) is modeled on Federal Rule of Civil Procedure 60(b). *See* 1973 Reporter's Note to Mass. R. Civ. P. 60.

in fact was considered and decided by a judge *other than* the judge challenged in that motion. Thus, the purported constitutional infirmity in the *Haddad* and *Lena* approach is immaterial.

Moreover, the Massachusetts approach satisfies both State and Federal due process concerns, as the Massachusetts Appeals Court has already determined. *See Howe v. Prokop*, 21 Mass. App. Ct. 919 (1985) (*Lena*'s recusal test satisfies requirements of both Article 29 of the Massachusetts Declaration of Rights and the Fourteenth Amendment to the Constitution of the United States).

It is well-established that a litigant's due process rights are not violated when the challenged judge decides a recusal motion directed against him or her. *See James v. Luebbers*, 359 F.3d 1005, 1015 (8th Cir. 2004). Indeed, that is the approach taken under the Federal recusal statutes, 28 U.S.C. §§ 144, 455, which require the substantially same analysis by the challenged judge as to whether he or she has "a personal bias or prejudice" and whether his or her "impartiality might reasonably be questioned" as do *Lena* and *Haddad*. Notably, the Federal statutes have been held to "establish a more stringent standard for disqualification than is required by the right to a fair trial guaranteed by the due process clause." *S. Pac. Comm. Co. v. Am. Telephone & Telegraph Co.*, 740 F.2d 980, 990 n.9 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985); *accord United States v. Haldeman*, 559 F.2d 31, 130 n.276 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977).

For these reasons, one safely may assume that Ms. Kettenbach, who was formerly represented by different counsel, did not previously overlook her newly minted constitutional argument but rather knew it to be meritless,

as did her co-defendants (who to this day have never advanced such an argument notwithstanding that assets and cash arguably worth in the neighborhood of one billion dollars are at issue).

III. THERE IS NO CONFLICT AMONG STATE COURTS WARRANTING THIS COURT'S REVIEW.

Contrary to Ms. Kettenbach's contention, there is no conflict among State courts rising to a level which warrants review by this Court. It may be true, as Ms. Kettenbach suggests relying solely on citation to a single treatise, that *in 1994* the various States afforded the challenged judge a somewhat different role in reviewing a recusal motion. *See* Petition, p. 17, *citing* Leslie W. Abramson, *Deciding Recusal Motions: Who Judges the Judges?*, 28 Val. U. L. Rev. 543, 545-47 & n.5 (1994). Yet, Ms. Kettenbach's Petition gives no indication of whether that supposed split still exists today, *more than a decade later*. Ms. Kettenbach offers no explanation as to why this Court should resolve a supposed split which she has not demonstrated still exists.

More fundamentally, the purported split Ms. Kettenbach identifies is not germane here. She claims that in the majority of States, including Massachusetts, the challenged judge decides the recusal motion, while in "several other" jurisdictions the challenged judge does nothing more than review "the timeliness of the motion and the legal sufficiency of the supporting affidavit" before referring it to another judge if legally sufficient, and, in "the remaining States" the motion is referred to another judge in every instance. Yet, here, the Massachusetts courts repeatedly found Ms. Kettenbach's and her co-defendants' recusal motions to be legally insufficient. Indeed, Ms.

Kettenbach's and her co-defendants' most recent recusal motion (dressed as a Rule 60 motion), which built upon all their prior recusal motions, was considered (and denied) by a different Massachusetts Superior Court judge, not the one challenged in her motion. Accordingly, Ms. Kettenbach received the review procedure advocated in her Petition.

Finally, as discussed above, Ms. Kettenbach has not demonstrated that the recusal procedure followed by Massachusetts, and apparently a majority of the other States, is constitutionally defective. There is little cause for this Court's resources to be expended addressing a supposed split which affects no one's substantial rights.

CONCLUSION

For the foregoing reasons, this Court should deny Ms. Kettebach's Petition for a Writ of Certiorari.

Respectfully submitted,

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(2)

Supreme Court, U.S.
FILED
MAY 13 2005
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No. 04-1257

IN THE

Supreme Court of the United States

FRANCES D. KETTENBACH,

Petitioner,

v.

RAFAELE LORAINE DEMOULAS, ADMINISTRATRIX OF THE ESTATE OF EVAN G. DEMOULAS AND NEXT FRIEND OF VANESSA EVAN DEMOULAS, DIANA D. MERRIAM, FOTENE J. DEMOULAS, ARTHUR S. DEMOULAS AND EVANTHEA DEMOULAS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPEALS COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

BRIEF IN OPPOSITION FOR RESPONDENTS DIANA D. MERRIAM, FOTENE J. DEMOULAS, ARTHUR S. DEMOULAS, AND EVANTHEA DEMOULAS

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STATEMENT OF THE CASE

I. The Misstatements In The Petition For A Writ Of Certiorari.

Pursuant to Supreme Court Rule 15.2, certain of the respondents, Arthur S. Demoulas, Diana D. Merriam, Fotene J. Demoulas and Evanthea G. Demoulas (hereafter "Respondents") wish to correct the misstatements in the Statement of the Case filed by the Petitioner. She states that there were acrimonious and widely publicized pretrial litigation from 1990 through 1994. Petition, p. 4. This was not the case. The litigation proceeded without any significant publicity until the trial of the Stock Transfer Case in 1994. Discovery was in the hands of a Discovery Master, and although it did consume much of the plaintiffs' and defendants' counsels' time during these four years, it was virtually without incident. It was only when the defendants faced defeat that acrimony and underhanded conduct began.

The Petitioner alleges, as have the defendants over the past ten years, that the trial court, *sua sponte*, reversed its dismissal of the defendant children of Telemachus Demoulas in the Stock Transfer Case after its decision in the Shareholder Derivative Case. Petition, p. 4. This is not the case. Prior to the commencement of the Shareholder Derivative Case, Judge Lopez received briefs arguing for and against the reversal of her decision to dismiss the claims against the defendant children of Telemachus and there was oral argument on the issue. R. App. 37, docket nos. 260, 266.

In the Petition, it is stated that Judge Lopez "bizarrely" testified that "the defendants and their counsel instigated or filed false affidavits against her, had her followed, searched her trash, placed electronic listening devices in her home and her judicial chambers and illegally reviewed her financial

records." Petition, p. 9. In fact, Judge Lopez only testified that the defendants and their counsel filed false affidavits against her, and further that she knew the content of the affidavits to be false. R. App. 904. The rest of the allegations had been reported to her by outside sources, including governmental authorities. *Id.*

II. The Motions For Recusal.

The Petition describes in a cursory manner the three prior motions for recusal with which the Supreme Judicial Court dealt. In light of the case law, *infra*, these Respondents believe that the reasoning of the Supreme Judicial Court requires more explication.

In *Demoulas v. Demoulas Super Markets, Inc.*, 424 Mass. 501 (1997) ("*Demoulas I*"), counsel for the Petitioner moved, before the trial began, that Judge Lopez recuse herself because of the impressions formed of the defendants during the trial of the Stock Transfer Case. *See id.* at 524. The Supreme Judicial Court held that "[n]one of the specific rulings cited by the defendants discloses a lack of impartiality on the judge's part." *Id.* at 526. All of the "sharp remarks" of the trial judge could be attributed to the "long, arduous, and at times, very bitter" conduct of the trial. *Id.* The Supreme Judicial Court was compelled to give credence to the judge's credibility findings because they were supported by numerous findings of fact. *See id.*

Demoulas v. Demoulas Super Markets, Inc. 428 Mass. 543 (1998) ("*Demoulas II*") concerned the allegations of the interaction between the trial judge and plaintiffs' lead counsel at the Charles Restaurant, a small neighborhood bistro which was eventually acquired by the judge's husband after the alleged communications between the judge and plaintiffs' counsel were said to have taken place. The Supreme Judicial

Court affirmed the denial of the defendants' motion based on its untimeliness and on the insufficiency of the allegations. *See id.* at 547-552. The court noted that the motion to recuse was filed on the eve of the execution of the judgment in the Shareholder Derivative Case, almost two years after the Supreme Judicial Court had affirmed judgment in favor of the plaintiff. *See id.* at 544. "Nor are we required to turn a blind eye to the fact that the motion was filed at the eleventh hour after years of maneuvering by the defendants on the losing side of a judgment in excess of one hundred million dollars." *Id.* at 550. In assessing the sufficiency of the affidavits, the court found that, taken at face value, they were "insufficient to establish a reasonable basis for questioning the judge's impartiality." *Id.* at 552. In other words, the defendants' motion was "too little, too late." *Id.*

Demoulas v. Demoulas, 432 Mass. 43 (2000) ("*Demoulas IV*") provided the crowning effort for the defendants' recusal motions. This strategy began after the decision of Judge Lopez in the Shareholder Derivative Action in 1995. Certain agents of the losing Telemachus Demoulas faction decided to implement an extremely complex and diabolical scheme to entice Judge Lopez' law clerk during the Shareholder Derivative trial to reveal, in the context of a fictitious job interview, the supposed predisposition of Judge Lopez against the defendants. *See*, *id.* at 47-48. Counsel for the defendants lured the clerk, Paul Walsh, to Nova Scotia and then to New York in an effort to tape, they hoped, his disclosures of Judge Lopez' bias against the defendants.[1] *See id.* Presumably because they did not get the disclosures they sought, the defendants' counsel eventually confronted Mr. Walsh and threatened him with disclosure of a falsified bar application

1. Three of the defendants' attorneys have been the subject of hearings by the Massachusetts Board of Bar Overseers and have been recommended for disbarment. *See* Jonathan Saltzman and Ralph Ranalli, *Disbarment Urged For Three In Scheme*, Boston Globe, May 12, 2005, p.1.

which would ruin his career. *See id.* at 48. Once again, the Supreme Judicial Court found that the defendants' motion was untimely (at least two years after the events which gave rise to the motions to recuse) *id.* at 50, and that the allegations were insufficient due to the fact that they were based on impermissible hearsay. *See id.* at 53-54.

DISCUSSION

I. The Petition Should Be Denied Because It Articulates No Compelling Reason For The Court To Exercise Its Discretion To Review This Matter Under Supreme Court Rule 10.

The Court should deny the Petition on grounds that Petitioner has failed to articulate any compelling reason justifying review as prescribed by Supreme Court Rule 10 (a-c). "Review on a writ of certiorari is not a matter of right, but of judicial discretion." *Id. See also Durham v. United States*, 401 U.S. 481, 483 n.1 (1971). The "principal purpose" for which the United States Supreme Court exercises its discretion to grant certiorari jurisdiction "is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991) (citing Supreme Court Rule 10). "[T]he Court seldom takes a case merely to affirm settled law[.]" *Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (Stevens, J., dissenting) (disagreeing with Court's grant of certiorari review of issue where all the courts of appeal to consider the issue reached substantially the same conclusion); *Buntz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 189 (1973) (Stewart, J. dissenting) (declaring the Court's grant of certiorari a "mystery" where "the case involves no more than the application of well settled principles to a familiar situation, and has little significance except for the respondent.").

Petitioner principally complains about a discrete decision by the Massachusetts Superior Court denying her motion for relief from two final judgments, entered more than four years and two-and-a-half years prior respectively, under Massachusetts Rules of Civil Procedure 60(b) on grounds that Petitioner discovered new evidence of judicial bias on the part of the trial court judge, the Honorable Maria Lopez. As Petitioner acknowledges, this motion marked the fourth time the defendants had raised the issue of judicial bias in the course of these proceedings at the Superior Court level. In each of the prior instances the matter was considered and rejected by the trial court, and affirmed on appeal by the Supreme Judicial Court. This fourth motion is little more than a rehashing of the defendants' prior accusations, thrice rejected by the highest court of Massachusetts. The Superior Court's denial of Petitioner's Mass. R. Civ. P. 60(b) motion, and the Massachusetts Appeals Court's affirmance of that decision, were premised upon longstanding rules of state law, and were in lockstep with the three prior appellate decisions on this issue.

Petitioner identifies no manner in which the most recent rejection of her claims by the Supreme Judicial Court conflicts with a decision of any other United States Circuit Court of Appeals or any state court of last resort on an important issue of federal law. The grounds for certiorari review under Rule 10(a) are inapplicable as Petitioner does not appeal from a decision of a United States Circuit Court of Appeal. Nor are the provisions of Rule 10(b-c) implicated, as the Supreme Judicial Court has not decided any important federal question that either conflicts with a decision of another state supreme court, this Court, or which has not been decided by this Court but should be. To the contrary, Petitioner acknowledges that none of the three Massachusetts courts below even reached the federal questions she now raises, let alone decided these questions in a manner contradictory to that of another jurisdiction. Petition pp. 10, 20.

Although Petitioner stresses that Massachusetts' judicial recusal procedure differs from that adopted by a minority of other jurisdictions, Petition § II, the mere existence of a disparity among the laws of sister states is not a valid ground for certiorari review. *Compare* Rule 10(b) (certiorari appropriate where "a state court of last resort has decided *an important federal question* in a way that conflicts with the decision of another state court of last resort[.]") (emphasis added). Petitioner cites no decision of another state court of last resort which conflicts with the decision of the Supreme Judicial Court in the instant case on an important issue of federal law. Moreover, while Petitioner complains that the Massachusetts approach to judicial recusal is unconstitutional in that it permits the judge whose sensibilities are in question to assess his or her own impartiality, in the present case it was a second judge who determined the defendants had failed to establish that Judge Lopez was biased. Judge Lopez had resigned from the bench by the time Petitioner had moved for relief from judgment, and it was the Honorable Patrick J. Brady who adjudicated Petitioner's claim of bias to be insubstantial. Appendix B to Petition ("App.") pp. 3-4. Petitioner has therefore failed to allege sufficient grounds under Rule 10 to justify this Court's exercise of its discretion to grant certiorari.

II. The Judgment Was Based On An Independent And Adequate State Law Ground Separate And Apart From Petitioner's Federal Claims.

A. Procedural Rules May Form Independent And Adequate State Law Grounds.

Where a state court judgment rests on a nonfederal ground, this Court must decline to accept jurisdiction and deny the Petition. *See Ellis v. Dixon*, 349 U.S. 458, 459 (1955). "This Court will not review a question of federal

law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (citing *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935)) (further citations omitted). "This rule applies whether the state law ground is substantive or procedural." *Id.* at 729 (citing *Fox Film Corp., supra*; *Herdon v. Georgia*, 295 U.S. 441 (1935)); *Hathorn v. Lovorn*, 457 U.S. 255, 262-65 (1982).

A state procedural ground is deemed "adequate" where it is "regularly followed[,]" *Hathorn*, 457 U.S. at 262-63 (citing *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964)), so long as it is applied "evenhandedly to all similar claims." *Id.* In addition, the state must have "a legitimate interest in enforcing its procedural rule." *Michigan v. Tyler*, 436 U.S. 499, 512 n.7 (1978); *see also New York Times Co. v. Sullivan*, 376 U.S. 254, 264 n.4 (1964)).

Here, the Massachusetts Appeals Court based its decision to affirm the decision of the Superior Court strictly on state law grounds. Petition, pp. 10, 20. First, the Appeals Court held that Petitioner's motion for relief from judgment pursuant to Mass. R. Civ. P. 60(b) was untimely. Second, that Petitioner's allegation of bias on the part of the trial judge had thrice been considered and rejected by the Supreme Judicial Court, and was now the law of the case. The Supreme Judicial Court, without comment, declined to grant Petitioner's request for further review of this matter.

B. Mass. R. Civ. P. 60(b) Is Firmly Established And Regularly Followed.

There can be no serious question that the courts of the Commonwealth of Massachusetts regularly follow the timeliness requirements of Mass. R. Civ. P. 60(b) and that

this rule is firmly established. Rule 60(b) permits relief from a final judgment in the event of:

> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> . . .
>
> (6) any other reason justifying relief from the operation of the judgment.

A litigant must move for such relief "within a reasonable time, and for reasons (1), (2), and (3) *not more than one year* after the judgment, order or proceeding was entered or taken." *Id.* (emphasis added).

Massachusetts courts have routinely applied this language as restricting the circumstances in which a litigant may seek relief under the catchall provision of Rule 60(b)(6), which is not subject to the definitive one-year time limit applicable to subsections 1 through 3, when the basis for relief articulated could fall within subsections 1 through 3. "Relief under rule 60(b)(6) is only appropriate when justified by some reason other than those set forth in rule 60(b)(1)-(5)." *Sahin v. Sahin*, 435 Mass. 396, 407 (2001) (citing *Anderson v. Anderson*, 407 Mass. 251, 257 (1990); *Bromfield v. Commonwealth*, 400 Mass. 254, 256 (1987); *see also Honer v. Wisniewski*, 48 Mass. App. Ct. 291, 295 (1999). "In other

words, to prevail under rule 60(b)(6), a party must show that there is a reason to justify the relief, and also that the reason is not within the grounds set forth in rule 60(b)(1)-(5)." *Id.* (citing *Parrell v. Keenan*, 389 Mass. 809, 814-15 (1983)); *accord In re Paternity of Cheryl*, 434 Mass. 23, 35 (2001); *Bromfield v. Commonwealth*, 400 Mass. 254, 256 (1987); *Bird v. Ross*, 393 Mass. 789, 791 (1985); *Chavoor v. Lewis*, 383 Mass. 801, 805-806 (1981); *Honer*, 48 Mass. App. Ct. at 295; *Murphy v. Administrator of the Div. of Personnel Admin.*, 377 Mass. 217, 228 (1979); *Tibbitts v. Wisniewski*, 27 Mass. App. Ct. 729, 731 (1989).

Though she feigns surprise that the Appeals Court treated her motion for relief from judgment as one arising under Rule 60(b)(1), (2), or (3), and thus subject to the one-year time limitation, *Petitioner herself* argued explicitly *in support* of this position to the Appeals Court. At pages 26 and 27 of Petitioner's Massachusetts Appeals Court Brief, under the heading entitled "Rule 60(b)", Petitioner argued:

> Several grounds specified in Rule 60(b) apply to the facts in this case - 60(b)(1), surprise; 60(b)(2), newly discovered evidence which by due diligence could not have been discovered; 60(b)(3), fraud; and 60(b)(6), any other reason justifying relief from the operation of the judgment.

This plain and candid acknowledgment by Petitioner that the basis for her motion for relief from judgment fell squarely within subsections 1 through 3 of Rule 60(b) left no doubt that they were foreclosed from seeking relief under Rule 60(b)(6). Accordingly, the decision of the Appeals Court to hold the Petitioner's motion subject to the one-year time limit was consistent with the holdings of the long line of cases cited above. *E.g.*, *Sahin*, 435 Mass. at 407.

Petitioner's attempt to reverse course at this late hour is impermissible, as she is estopped from shedding the position she argued forcefully below to assert a contrary one to this Court in the first instance. *E.g. New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (under the doctrine of judicial estoppel, where a party assumes a certain position in a legal proceeding, and persists in maintaining that position, he may not thereafter assume a contrary position simply because his interests have changed) (collecting authority). Moreover, had the Supreme Judicial Court granted Petitioner's request for further review of this issue, she would have been "estopped from reversing [her] earlier positions" before that court as well. *Fortin v. Ox-Box Marina, Inc.*, 408 Mass. 310, 323 (1990); *accord Brown v. Quinn*, 406 Mass. 641, 646 (1990) (collecting authority).

Moreover, Petitioner's contention that her motion could only have been construed as arising under the catchall provision of subsection 6 because her belated discovery of further evidence of Judge Lopez' supposed bias against them can only be characterized as "fraud on the court", as opposed to "newly discovered evidence", is erroneous as a matter of Massachusetts law. Petition, pp. 22-24. The Supreme Judicial Court has held that fraud on the court occurs "'where it can be demonstrated, clearly and convincingly, that *a party* has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense.'" *Sahin*, 435 Mass. at 405-406 (quoting *In re Paternity of Cheryl*, 434 Mass. at 35) (emphasis added); *accord Rockdale Management Co., Inc., v. Shawmut Bank*, 418 Mass. 596, 598 (1994) (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944)). Petitioner points to no Massachusetts case holding that opinions formed by judges of the litigants before them

can constitute a such fraud against the judicial system as a whole. Their effort to cast the trial judge's statements, ostensibly expressing a negative view of the defendants nearly ten years following the commencement of the first trial, as evidence of the *Judge's* deliberate scheme to defraud or manipulate *herself*, lacks any support in Massachusetts case law and is simply illogical.

Moreover, Petitioner's claim was best characterized as one involving newly discovered evidence, albeit cumulative and insufficient. The defendants had already raised the issue of judicial bias repeatedly throughout these proceedings. The testimony on which Petitioner premised her motion is merely more of the same, cumulative to the evidence upon which the defendants founded their accusation the first three times they asserted it.

Plainly, Petitioner's most recent re-tooling of her basis for relief from judgment as "fraud on the court" is an attempt at an end-run around the one-year limitation of Rule 60(b)(1-3). The Appeals Court's decision that Petitioner's claim was cognizable under any of subsections 1 through 3, and that the one-year limitation applied to bar her claim of newfound evidence of judicial bias, was in keeping with well established and consistently enforced principles of Massachusetts law.

C. Mass. R. Civ. P. 60(b) Promotes The Legitimate State Interest Of Finality Of Judicial Decisions.

Massachusetts Rule of Civil Procedure 60(b) is based upon the legitimate state interest of promoting the finality of judgments. "It is the function of rule 60(b)(6) to preserve the delicate balance between the sanctity of final judgments . . . and the incessant command of the court's conscience that justice be done in light of all the facts." *Winthrop Corp. v. Lowenthal*, 29 Mass. App. Ct. 180, 188 (1990) (quoting

Freitas v. Freitas, 26 Mass. App. Ct. 196, 198 (1988) (citing *Bankers Mortgage Co. v. United States*, 423 F.2d 73, 77 (5th Cir.), *cert. denied*, 399 U.S. 927 (1970)) (further citations omitted); *see also* J.W. SMITH & H.B. ZOBEL, RULES PRACTICE, § 60.15 (1983 Supp.). "That tension between finality and fair play (finality itself, of course, being a form of fair play) finds voice in warnings that the rule should not be used as an instrument for relief from deliberate choices which did not work out." *Id.* (citing *Ackermann v. United States*, 340 U.S. 193, 198-199 (1950)) (further citations omitted). "In the interest of finality of judgments, relief under rule 60(b)(6) is only to be granted in extraordinary circumstances." *Sahin*, 435 Mass. at 406 (citing *Bromfield v. Commonwealth*, 400 Mass. 254, 257 (1987)) (further citations omitted); *see also Chiu-Kun Woo v. Moy*, 17 Mass. App. Ct. 949, 950 (1983) (concern about finality of litigation is an appropriate consideration when acting on motion for relief from judgment). It is axiomatic that the promotion of finality of judgments, while preserving the possibility for relief from judgments under extraordinary circumstances, is a legitimate state interest, essential to a fair and efficient judicial system in which litigants may safely rely upon the judgments of the courts. Accordingly, the one-year time limitation of Mass. R. Civ. P. 60(b) constitutes an adequate basis in state law precluding review of the issues upon which Petitioner seeks certiorari.

D. The Doctrine Of Law of Case Is Firmly Established And Regularly Followed.

The second ground upon which the Appeals Court affirmed the Superior Court's denial of Petitioner's Rule 60(b) motion was that Judge Lopez' prior denials of the defendants' repeated motions for recusal had been reviewed by the Supreme Judicial Court on three separate occasions and had, in each instance, been affirmed. (App. pp. 1-2, 22-

26). The Appeals Court accordingly held that the question of Judge Lopez impartiality, which she maintained despite the defendants' outrageous and deceitful conduct aimed at her and her staff, had been finally decided and was the law of the case. *Id.* The law of the case is an adequate state law ground as it is firmly established and routinely followed by the courts of Massachusetts.

"The 'law of the case' doctrine reflects this court's reluctance 'to reconsider questions decided upon an earlier appeal in the same case.'" *King v. Driscoll*, 424 Mass. 1, 7-8 (1996) (quoting *Peterson v. Hopson*, 306 Mass. 597, 599 (1940)). "An issue once decided, should not be reopened unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice." *Id.* (quoting *White v. Murtha*, 377 F.2d 428, 432 (5th Cir. 1967)) (internal quotation marks and further citations omitted). It is consistently adhered to by the courts of Massachusetts. *E.g. King*, 424 Mass. at 7-8; *Horvitz v. Commissioner of Revenue*, 60 Mass. App. Ct. 1103, 2003 WL 22764593 *2 (2003) (Table); *Commonwealth v. Hall*, 55 Mass. App. Ct. 1105, 2002 WL 1358480 *1 (2002) (Table); *Vittands v. Sudduth*, 49 Mass. App. Ct. 401, 413 (2000).

"Issues of bias and self-interest, to be disqualifying, cannot be unilaterally created by the moving party." *In re WHET, Inc.*, 33 B.R. 424, 433 (D. Mass. 1983). Any feelings Judge Lopez had or has for the Petitioner has been entirely created by her, and not solely in connection with the Commission on Judicial Conduct ("CJC") hearings, but throughout this long litigation. The Supreme Judicial Court, the Appeals Court and the Superior Court are satisfied that she could put those feelings aside and judge the case fairly "in accordance with our laws." R. App. at 905. That is the "law of the case" and it should be permitted to stand.

That this doctrine has certain recognized exceptions does not, as Petitioner contends, mean that it is "permissive", or anything other than a well established rule with clearly delineated contours. Petition, p. 24. The fact that the rule calls upon state court judges to determine whether, in a specific instance, a prior ruling of an appellate court "was clearly erroneous and would work a manifest injustice", does not mean that the rule is not applied "evenhandedly to all similar claims." *Hathorn*, 457 U.S. at 263. Petitioner's reliance on *King* to support her flawed contention is misplaced. Rather than disregard this rule, the Supreme Judicial Court in *King* expressly concluded that none of the recognized exceptions were applicable on the facts before it, and declined to revisit issues already addressed on prior appeals. *See King*, 424 Mass. at 8. In the instant case, asked to reopen an issue which was the subject of three prior appellate decisions and with scant evidence that the prior decisions were ill founded, the Appeals Court reached the same conclusion as the court in *King*.

E. The Doctrine Of Law Of The Case Serves A Legitimate State Interest.

The doctrine of law of the case, like Mass. R. Civ. P. 60(b) discussed above, fosters the important state interest of promoting consistency among judicial rulings, finality, and judicial efficiency, avoiding needless relitigation of issues previously adjudicated by both a lower and an appellate court. Finality and judicial efficiency have not, until now, been the hallmark of this litigation. The issue of Judge Lopez' recusal was before the Supreme Judicial Court three times and each time the court carefully considered the defendants' contentions. *See Demoulas I* at 524-527; *Demoulas II* at 544-553; *Demoulas IV* at 45-55. *Demoulas II* concerned the allegations of the defendants regarding Judge Lopez' alleged conduct at the Charles Restaurant. Judge Lopez denied

defendants' motion to recuse, holding that the allegations were premised upon false affidavits. R.App. 185. The Supreme Judicial Court had this record before it when it decided *Demoulas II*, and it affirmed the decision of Judge Lopez. *Demoulas IV* principally concerned what the "fruits" of the defendants' scheme to trick Judge Lopez' law clerk into making damaging admissions about the judge during phony job interviews staged by counsel for the defendants. The Supreme Judicial Court had before it the evidence of this hoax when it decided *Demoulas IV*. Accordingly, when the Supreme Judicial Court again affirmed Judge Lopez refusal to recuse herself, the court was aware that Judge Lopez considered the defendants and their counsel, at a minimum, to be deceptive and allied against her. When Judge Lopez voiced these facts and impressions at the CJC hearings, it was not new information. Rather, it had already been considered when the Supreme Judicial Court decided *Demoulas II* and *Demoulas IV*. It was, indeed, the "law of the case".

Finality and judicial efficiency are legitimate state interests, particularly in this case which has been pending for fifteen years. As the Fifth Circuit Court of Appeals stated:

> The law of the case rule is based on the salutary and sound public policy that litigation should come to an end. It is predicated on the premise that there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions or speculate of chances from changes in its members, and that it would be impossible for an appellate court to perform its duties satisfactorily and efficiently and expeditiously if a question, once considered and decided by it were

> to be litigated anew in the same case upon any and every subsequent appeal thereof.

White, 377 F.2d at 431 (citations and internal quotation marks omitted).

In this case, this Court should promote that sound public policy and refuse to reopen what has already been decided. The Petitioner has had three chances to go back to square one and start over. She has gone to incredible lengths to unseat Judge Lopez, and is analogous to the woman who kills her parents, and then throws herself on the mercy of the court because she is an orphan. Accordingly, because the law of the case doctrine rests on sound policy and promotes a legitimate state interest, it constitutes an adequate basis in state law precluding review of the issues on which Petitioner seeks certiorari.

III. Petitioner Has Waived Review Of Its Claims By This Court.

A. Petitioner Waived Review Of Question One, Whether The Massachusetts Judicial Recusal Test Itself Offends Petitioner's Fourteenth Amendment Right To A Fair Trial By A Fair Tribunal Under The United States Constitution, By Failing To Raise This Issue In Either The Superior Court Or Appeals Courts In The First Instance.

Petitioner's failure to raise Question One at any point before the Superior Court or Appeals Court barred its review by the Supreme Judicial Court and, accordingly, bars certiorari review of this issue as it was never decided below. A failure to comply with the applicable state rules for properly presenting a federal claim to the state's highest court will

bar certiorari review of such issue by this Court under 28 U.S.C. § 1257. *See Adams v. Robertson*, 520 U.S. 83, 86-88 (1997) (per curium); *see also Tyler*, 436 U.S. at 512 n.7. It is a well established rule of procedure in Massachusetts that a matter cannot properly be presented to the Supreme Judicial Court where it has not been pleaded or tried in the lower court in the first instance. *E.g. Penney v. First Nat'l Bank of Boston*, 385 Mass. 715, 718 n.2 (1982) (citing *Paro v. Longwood Hosp.*, 373 Mass. 645, 652 n.9 (1977) (failure to raise below a procedural due process claim arising under Massachusetts Declaration of Rights bars review by Supreme Judicial Court); *Royal Indem. Co. v. Blakely*, 372 Mass. 86, 87-88 (1977) (collecting authority); *Trustees of the Stigmatine Fathers v. Secretary of Administration & Fin.*, 369 Mass. 562, 565 (1976)).

Petitioner's contention that she could not raise this issue before any court other than the Supreme Judicial Court in the first instance is meritless. While it is true that an intermediate appellate court lacks authority to "overrule or decline to follow the holding of cases that the Supreme Judicial Court has decided[,]" *Commonwealth v. Donohue*, 59 Mass. App. Ct. 476, 485 (2003), the Supreme Judicial Court has never passed on the issue at hand. To the contrary, the Appeals Court squarely addressed the very question Petitioner raises, concluding that the Massachusetts judicial bias standard does not violate the Fourteenth Amendment of the Constitution of the United States. *See Howe v. Prokop*, 21 Mass. App. Ct. 919, 919-20 (1985). Had Petitioner raised this issue before the Appeals Court, that court would not have been constrained by a prior binding decision of the Supreme Judicial Court, and would have been free to reexamine the issue. *Donohue*, 59 Mass. App. Ct. at 485. Indeed, this was Petitioner's obligation prior to raising the issue before the Supreme Judicial Court. *E.g. Penney*, 385 Mass. at 713 n.2.

Petitioner acknowledges that she failed to raise her federal due process challenge to the Massachusetts standard for judicial recusal at any point before the Massachusetts trial and intermediate appellate court. Petition p. 18. Review of Question One is therefor barred from review by this Court. *See Adams*, 520 U.S. at 90 ("Petitioners having thus failed to carry their burden of showing that the claim they raise here was properly presented to the Alabama Supreme Court, we will not reach the question presented.").

B. Petitioner Waived Question Two, Whether The Trial Judge's Bias Violated Petitioner's Fourteenth Amendment Right To A Fair Trial By A Fair Tribunal Under The United States Constitution, By Failing To Adequately Articulate This Issue Below.

Petitioner failed to adequately develop the second issue on which she seeks this Court's review before the Massachusetts Appeals Court, and this Court should decline to review it. Question Two, in which Petitioner contends that the bias and prejudice ostensibly exhibited by the trial judge was so pronounced as to violate her right to a fair trial secured under the Fourteenth Amendment of the United States Constitution, was raised in no more than a perfunctory, superficial, and conclusory manner below. Petitioner has failed to meet her burden of rebutting this Court's presumption that the Supreme Judicial Court's silence on her federal claim was not attributable to Petitioner's failure to properly preserve this claim for that court's review.

This Court, when "reviewing state court judgments under 28 U.S.C. § 1257 . . . will not consider a petitioner's federal claim unless it was either addressed by, or properly presented

to, the state court that rendered the decision. . . ." *Adams*, 520 U.S. at 86 (holding certiorari was improvidently granted as issue never properly presented to state supreme court).

> When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented, and the aggrieved party bears the burden of defeating this assumption, by demonstrating that the state court had 'a fair opportunity to address the federal question that is sought to be presented here.'

Id. (quoting *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987); further citing *Webb v. Webb*, 451 U.S. 493, 501 (1981); *Street v. New York*, 394 U.S. 576, 583-85 (1969)). A petitioner must demonstrate that "the claim [asserted] and the ground therefor be brought to the attention of the state court with fair precision and in due time." *Street*, 394 U.S. at 582.

At no point in her brief filed with the Appeals Court does the Petitioner clearly articulate her claim that the Superior Court's denial of her Rule 60(b) motion violated her rights under the Fourteenth Amendment of the United States Constitution. Petitioner mentions due process in a mere four sentences in the course of defendants' 49 page brief, and discusses this concept in general terms. Defendants' Massachusetts Appeals Court Brief, pp. 29-32. Nowhere does the Petitioner explain her position in a manner which specifically delineates her theory, beyond the superficial and conclusory claims that the trial judge was biased against her and, *ipso facto*, she was denied a fair trial. Similarly, before the Superior Court, Petitioner scatters five sentences which generically mention the Due Process Clause of the Fourteenth Amendment across a 32 page brief principally devoted to Petitioner's Rule 60(b) arguments. Defendants' Emergency

Motion For Relief From Judgment, pp. 23-27. In each instance the Petitioner leaves the specifics of her claim to the imagination.

Because Petitioner paid mere lip service to her federal claim articulated in Question Two below, she cannot carry her burden of establishing that this claim was properly presented to the Supreme Judicial Court or the Massachusetts Appeals Court, and this Court should decline to hear this claim. *Webb v. Webb*, 451 U.S. 493, 495-96 (1981) (sporadic mention of "full faith and credit" without further development and more particularized description of federal claim).

IV. Judge Lopez' Decisions Not To Recuse Herself Did Not Violate The Petitioner's Fourteenth Amendment Rights.

A. The Massachusetts Recusal Test Has The Same Components As The Federal Recusal Statute.

Massachusetts Supreme Judicial Court Rule 3:09, Canon 3 E sets forth the standards under which a judge must disqualify himself or herself. Those which are relevant to this case are an objective one: where the judge's impartiality might reasonably be questioned; and a subjective one: whether the judge has a personal bias or prejudice concerning a party or a party's lawyer. Massachusetts courts have adopted this subjective/objective application as a two-part self-examination. *See Lena v. Commonwealth*, 369 Mass. 571, 575 (1976); *Haddad v. Gonzales*, 410 Mass. 855, 862 (1991).

In 1974, Congress revised the federal disqualification statute. 28 U.S.C. § 455(a) starts out with the objective test: a judge must "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Then, the subjective test is set forth: "He shall also disqualify

himself . . . where he has a personal bias or prejudice concerning a party." 28 U.S.C. § 455(b)(1). This Court recognized the subjective/objective nature of the revised statute in *Liteky v. United States*, 510 U.S. 540, 548 (1994). The federal recusal statute has been reviewed, analyzed and discussed by this Court, and not once has it ever been hinted that it does not pass constitutional muster. *See, e.g., Cheney v. U.S. Dist. Ct. for the Dist. of Columbia*, 541 U.S. 913, 124 S. Ct. 1391, 1394 (2004); *Microsoft Corp v. United States*, 530 U.S. 1301, 121 S. Ct. 25, 26-27 (2000); *Liljberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 858-66 (1988).

The Petitioner argues that the Massachusetts recusal rule is unconstitutional because Judge Lopez sat as her own judge on the recusal issue. Petition at pp. 11-14. However, the federal statute also leaves the question of recusal in the hands of the judge to whom the motion is directed. It is a "self-enforcing obligation." *United States v. State of Alabama*, 828 F.2d 1532, 1540 (11th Cir. 1987). As one federal court noted, "[r]ecusal is a highly personal decision. The judge must assess the truth of the facts alleged and determine if they would impeach his impartiality or appearance of impartiality." *Clay v. Brown Hopkins & Stambaugh*, 892 F. Supp. 11, 13 (D.D.C. 1995) (citing *Liberty Lobby, Inc. v. Dow Jones & Co., Inc.*, 838 F.2d 1287, 1301 (D.C. Cir. 1988)). Indeed, as Judge John Sirica, Jr. pointed out in the infamous Watergate litigation, "[o]nly the individual judge knows fully his own thoughts and feelings and the complete context of facts alleged. It follows that only he can be certain of the most equitable resolution." *United States v. Mitchell*, 377 F. Supp. 1312, 1315 (D.D.C. 1974). If it is constitutionally acceptable for a federal judge to decide whether recusal is appropriate for himself or herself, it follows that a Massachusetts judge, using substantially the same recusal test, must be able to make the recusal decision without violating the Fourteenth Amendment rights of any litigant.

B. Not All Grounds For Recusal Involve Constitutional Principles.

Judicial disqualifications as it relates to the federal constitution has been considered by this Court on a number of occasions and the application of this issue has evolved over the last seventy-eight years. In *Tumey v. Ohio*, 273 U.S. 510 (1927), this Court considered the constitutionality of a Prohibition statute and ordinance under which a public official who presided at certain criminal trials was monetarily rewarded for each conviction, albeit only slightly. *Id.* at 520. This Court held that, even though the consideration was minor ($12 per case), it violated the due process rights of the defendants because it constituted ". . . a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant . . ." *Id.* at 532. Before reaching that conclusion, the Court held that "[a]ll questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest would seem generally to be matters merely of legislative discretion." *Id.* at 523. Thus, a judge's personal bias against a litigant may be statutorily prohibited but there was no constitutional impediment.

Twenty-one years later, the issue of bias as a constitutional frailty was raised in *FTC v. Cement Institute*, 333 U.S. 683 (1948). In that case, one of the parties asked this Court to review the validity of a cease and desist order issued by the Commission in light of the fact that the pricing system at issue in the order had been condemned as illegal by the Commission in reports made to Congress and to the President. *See id.* at 700. The Court held that most matters concerning judicial disqualification do not involve constitutional issues and that it was not a violation of procedural due process for a judge to preside in a case where the issue at hand was one about which he had previously expressed a negative opinion. *See id.* at 702-03.

In 1986, this Court again dealt with the issue of judicial disqualification and constitutional violation. *Aetna Life Ins. Co. v. Lavore*, 475 U.S. 813 (1986) dealt with the pecuniary interest of an appeals court judge who cast the deciding vote in favor of the appellees. *See id.* at 816-17. The Court held that such interest violated the appellants due process rights under the Fourteenth Amendment. *Id.* at 824-25. In reaching this decision, the Court considered whether the judge's bias in favor of the position held by the appellee would be sufficient to disqualify the judge on constitutional grounds. *See id.* at 820-21. The decision quoted the *Tumey* case concerning the fact that personal bias did not, generally, involve a question of constitutional validity. *See id.* at 820. It then stated "We need not decide whether allegations of bias or prejudice by a judge of the type we have here would ever be sufficient under the Due Process Clause to force recusal. Certainly only in the most extreme of cases would disqualification on this basis be constitutionally required . . ." *Id.* at 821. Thus, for the first time, the Court was considering the possibility that personal bias could be a constitutional violation.

Finally, in *Bracy v. Gramley*, 520 U.S. 899 (1997), this Court dealt with a case in which the petitioner had been tried, convicted and sentenced to death by a judge who was later convicted himself for taking bribes from certain criminal defendants. The Court discussed the issue of constitutional judicial disqualification:

> Of course, most questions concerning a judge's qualifications to hear a case are not constitutional ones, because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard. . . . Instead, these questions are, in most cases, answered by common law, statute or the professional standards of the bench

> and bar. . . . But the floor established by the Due Process Clause clearly requires a "fair trial in a fair tribunal" . . . before a judge with no actual bias against the defendant or interest in the outcome of his particular case.

Id. at 904-05 (citations omitted).

In *Bracy*, the Court moved closer to finding that *actual bias*, not presumed bias, not the appearance of impropriety, could amount to a constitutional violation. At issue in the *Bracy* case was whether the petitioner could take post-appellate discovery to discover whether actual bias toward the petitioner existed. *See id.* at 901. The Court did not decide that actual bias was constitutionally disabling because the petitioner had not yet obtained any evidence of actual bias. *See id.* at 905. Indeed, prior to the *Bracy* decision, the Court warned that those making a claim of unconstitutional judicial bias must overcome a presumption of honesty and integrity on the part of judges. *See Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

A decision of the Eighth Circuit Court of Appeals comes closest to the issue in this case, while following the dictates of this Court concerning constitutional judicial disqualification. In *Dyas v. Lockhart*, 705 F.2d 993 (8th Cir. 1983), the court was faced with the fact that the judge presiding during the criminal trial of the appellant was related to both the Prosecuting Attorney and two of the Deputy Prosecuting Attorneys. *See id.* at 995. The judge had offered to recuse himself but appellant's counsel refused the offer. The appeal was based on the claim that the judge was necessarily biased and prejudiced against the party charged with the crime which violated the appellant's constitutional rights. *See id.* The court stated that the constitutional rights of the appellant included the right to a "fair trial in a fair

tribunal" *Id.* It then held that a demonstration of actual bias was necessary to invoke the Due Process Clause. *See id.* at 996. However, it acknowledged that the probability of actual bias was too high where the judge has been the target of personal abuse by the appellant. *Id.* In that case, the test is whether the judge, possessing ordinary human tendencies, would be unable to hold the proper balance between the contesting parties, keeping in mind the presumption of honesty and integrity of those serving as judges. *See id.* at 996-997. This is exactly the test which Judge Brady, in denying the Petitioner's motion for relief from judgment in the trial court, applied. He found that there was "no evidence that Judge Lopez did not do exactly as she said in her Memorandum of Decision dated July 22, 1997, namely, to separate her feelings about having her integrity unfairly challenged from her responsibilities to make fair and impartial rulings" Petition at App. 3. Thus, the proof of actual bias, as required by this Court, or the high probability of actual bias, acknowledged by the *Dyas* court, was not present in this case and, thus, no constitutional violation occurred.

C. This Court Can Determine Independently That Judge Lopez Harbored No Actual Bias Toward The Petitioner In Violation Of The Petitioner's Constitutional Rights.

There was no evidence of actual bias or prejudice on the part of Judge Lopez against the defendants revealed in the record of the CJC hearings. A review of the CJC transcripts demonstrates that Judge Lopez, while acknowledging that the defendants and their counsel had, indeed, set out on a protracted and intense effort to disqualify her, did her best to maintain the necessary judicial impartiality to decide the remaining issues in the litigation. She learned about both the Charles Restaurant accusations and the Paul Walsh imbroglio in the Summer of 1997. R. App. 174, 521. She

knew to an absolute certainty that these attacks on her conduct had no basis in reality. R. App. 904. However, this knowledge did not create actual bias in her head or in her heart and nothing she said in the CJC hearing proved otherwise.

CJC hearings established that Judge Lopez thought that the Demoulas defendants and their counsel harbored animus against her and her rulings. However, nothing in her testimony provides any information about her possible bias against the defendants. Not surprisingly, the most important portion of the testimony of Judge Lopez at the CJC hearings is absent from the Petition. On direct examination, her counsel asked Judge Lopez how she felt about the measures the defendants and their counsel had taken to find evidence of her supposed bias. She stated:

> Well, I mean, I was very upset that my professional reputation was being impugned that way. I mean, I knew that what was being alleged in those [Charles Restaurant] affidavits – I knew that to be false.
>
> I was very upset, and I was angry that there would be such an effort, not only to attack me personally, but to use those kinds of means to undermine *a decision that had been rendered in accordance with our laws, fairly decided.* And I thought it as an attempt on their part to disqualify me in some way – and in fact the SJC saw it that way too – to get me disqualified so that they could get a new trial on the cases, because they were unhappy with the results in that case.
>
> So they marshaled every force they could come up with to get me – to get a new judge to retry the case. And so I felt attacked. I felt besieged.

R. App. 905 (emphasis added).

Nowhere in her statement concerning her feelings about the actions of the lawyers for the defendants does Judge Lopez display any animosity toward the defendants or even toward those responsible for the attacks on her. Her language is couched in the past tense; she *was* upset and angry. There is not hint that these feelings carried over into the courtroom. In fact, after her discovery of these matters in the Summer of 1997, Judge Lopez made at least two significant decisions in favor of the defendants, one involving an over $20 million reimbursement to them. *See Demoulas IV*, 432 Mass. at 65-68.

In *Wilks v. Israel*, 627 F. 2d 32 (7th Cir. 1980), a prisoner filed a habeas corpus petition based on his allegation that he had assaulted the judge and, therefore, the judge was biased against him, infringing his constitutional right to a fair trial. *See id.* at 36. The court held that the petitioner's deliberate attacks on the judge could not force judicial disqualification because, if this were the case, it would encourage other such attacks and "would greatly disrupt judicial administration." *Id.* at 37. On the other hand, the court found that a judge could become so personally embroiled in the controversy that due process concerns would necessitate his removal. *See id.* To resolve the issue, the court advised that it should examine the record of the trial to determine whether the petitioner received a fair trial and, in the case at issue, the appellate court determined that the trial court's rulings were appropriate. *Id.* In this case, the trial court's rulings have survived the scrutiny of the highest court in the Commonwealth of Massachusetts which, in virtually every instance, found Judge Lopez' decisions to be appropriate and correct. This Court can take notice of this fact and conclude that there has been a determination that no actual bias by Judge Lopez against the defendants could be proven and that, accordingly, no violation of the Petitioner's Fourteenth Amendment right has occurred.

CONCLUSION

For the reasons set forth above, the Petition for Certiorari should be denied.

Respectfully submitted,

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No. 04-1257

In The
Supreme Court of the United States

FRANCES D. KETTENBACH,

Petitioner,

v.

RAFAELE LORAINE DEMOULAS, ADMINISTRATRIX OF THE ESTATE OF EVAN G. DEMOULAS AND NEXT FRIEND OF VANESSA EVAN DEMOULAS, DIANA D. MERRIAM, FOTENE J. DEMOULAS, ARTHUR S. DEMOULAS AND EVANTHEA DEMOULAS,

Respondents.

On Petition For A Writ Of Certiorari To The Appeals Court For The Commonwealth Of Massachusetts

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INTRODUCTION

Although the petitioner believes that her contentions were fully presented in her petition for certiorari, the respondents Diana D. Merriam and others (hereinafter, Demoulas respondents) and Rafaele Lorain Demoulas (hereinafter, Rafaele Demoulas) have raised several matters in their separate briefs that deserve and require treatment in this reply brief.

DISCUSSION

I. THE PRIVATE INVESTIGATION OF ALLEGED JUDICIAL BIAS YIELDED FINDINGS SUPPORTIVE OF THE PETITIONER'S CONTENTIONS

The Demoulas respondents describe (Brief, pp. 3-4 & n.1) a scheme ("ruse") which involved three of the attorneys who represented the defendants in earlier phases of this litigation, and which resulted in bar disciplinary proceedings. Unsurprisingly, the respondents omit mentioning that, however one may characterize these attorneys' conduct, the lengthy disciplinary hearings produced clear findings of fact corroborative of Judge Lopez's bias against the petitioner. The hearing officer for the Massachusetts Board of Bar Overseers wrote:

> "I find that [the clerk, Paul Walsh] did tell Curry and LaBonte that Judge Lopez was biased and predisposed to the plaintiffs. . . . I also find that Walsh told Curry and LaBonte that Judge Lopez told him before the trial began who the 'good guys and bad guys' were and who the 'winners and losers' were going to be."

Bar Counsel *vs.* Kevin P. Curry & others, Board of Bar Overseers File Nos. C1-97-0602, C1-97-0589, C1-97 (9) 589, Special Hearing Officer's Report, par. 175 at p. 53 (May 11, 2005), at <http://www.mass.gov/obcbbo/highlit.htm.>[1] The defendants' third recusal motion, based on the information Walsh had imparted, was denied by Judge Lopez, R. App. at 90, 451, and her ruling was affirmed by the Supreme Judicial Court, *Demoulas* v. *Demoulas*, 432 Mass. 43, 55, 732 N.E. 2d 875, 884 (2000).

II. THE RESPONDENTS IGNORE THE SUBSTANTIAL AND RECURRING IMPORTANCE OF THE FEDERAL QUESTION PRESENTED IN THIS CASE

The respondents claim that the petitioner advances no compelling reason for this Court to grant review. Demoulas respondents' brief, pp. 4-6. Rafaele Demoulas's brief, pp. 5-6. They choose to ignore several points of conflict in State and Federal decisional law that warrant review by this Court. These are *first* and foremost, the conflict between Massachusetts judicial recusal procedures and the decisions of this Court articulating due process principles. See Petition for a Writ of Certiorari (hereinafter, Petition), pp. 11-14. *Second*, the Demoulas respondents disregard the conflict between judicial decisions in Massachusetts and the decisions in those States recognizing that the appearance of bias or impropriety, as distinct from actual bias or impropriety, is sufficient to implicate Federal due process rights. See *Commonwealth* v. *Brandenburg*, 114 S.W. 2d

[1] If Judge Lopez made these statements to Walsh, she would have made them at approximately the time she denied the first recusal motion. R. App. at 152-153.

830 (Ky. 2003); *Wolfkill Feed & Fertilizer Co.* v. *Martin*, 103 Wash. App. 836, 14 P.3d 877 (2000); *Brengelmann* v. *Land Resources of New England & Canada, Inc.*, 393 A.2d 174, 178 (Me. 1978). Compare *Lena* v. *Commonwealth*, 369 Mass. 571, 575, 340 N.E. 2d 884, 886-887 (1976) (appearance of impropriety as a ground for disqualification not constitutionally based). Compare also *DelVecchio* v. *Illinois Dept. of Corrections*, 31 F.3d 1363, 1380 (7th Cir. 1994), cert. denied, 514 U.S. 1037 (1995); *Johnson* v. *Carroll*, 369 F.3d 253, 260 (3d Cir. 2004), cert. denied, 125 S. Ct. 1639 (2005) (each interpreting decisions of this Court and concluding that the appearance of bias, without more, did not require recusal of a State judge under due process principles). The *third* area of conflict is between the Massachusetts decisions on this subject and the decisions in those jurisdictions recognizing that self-analysis by an obviously biased judge is impossible. *Surratt* v. *Prince George's County*, 320 Md. 439, 466, 578 A.2d 745, 758 (1990). *Gillum* v. *United States*, 613 A.2d 366, 369 (D.C. 1992). *In re International Bus. Machs. Corp.*, 618 F.2d 923, 926-927 (2d Cir. 1980). Contrary to the respondents' contention, the present case offers the opportunity for this Court to resolve fundamental conflicts affecting the scope of Federal constitutional protections afforded to litigants in State courts.

Equally unavailing is the respondents' effort to attach weighty significance to the fact that a different Superior Court judge (motion judge), and not Judge Lopez, ruled on the motions for relief from judgment.[2]

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[2] Judge Lopez had resigned after disciplinary proceedings against her before the Commission on Judicial Conduct arising from another case unrelated to the *Demoulas* litigation. The Commission's hearing

(Continued on following page)

Demoulas respondents' brief, p. 6. Rafaele Demoulas's brief, pp. 3-4. At the time the motion judge issued his ruling, Judge Lopez had already sat in judgment of her own challenged conduct on no fewer than three occasions. On any one or more of these occasions, her rulings may have been biased against the defendants, for the plain reason that her own sworn testimony before the Commission on Judicial Conduct revealed such bias and even paranoia. See, for example:

> " . . . I have been persecuted by some very powerful enemies I made in a very big case. And I'm sure you're not familiar with what I went through with the Demoulas losing side and their lawyers, but let me just tell you that there were many false complaints filed against – they suborned perjury, I was being followed, I had to have my house – the state police to come in and check for bugs in my house. They were going through my garbage."

Tr. Oct. 31, 2001, p. 154, R. App. at 743.[3]

Despite this statement of judicial bias, the motion judge ruled that "Judge Lopez's testimony before the Judicial Conduct Commission does not evidence any bias which may have affected her rulings." Petition, p. App.-3. Astonishingly, he reached this conclusion without ever hearing evidence that would have enabled him to determine at precisely what point in the litigation Judge

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officer found that she had violated several of the canons of judicial ethics and recommended a six months' suspension. Hearing officer's report, pp. 37-90, R. App. at 782-836.

[3] In this testimony, Judge Lopez did not attribute her views to any "outside sources." Compare Demoulas respondents' brief, p. 2.

Lopez's *admitted* bias arose. The motion judge's memorandum of decision strays even further afield by referring to "the false allegations against Judge Lopez by the defendants' attorneys" and "[Judge Lopez's] feelings about having her integrity unfairly challenged." *Ibid.* Whether the defendants' allegations were "false" or their challenges "unfair" were crucial questions of fact on which they were entitled to an evidentiary hearing. For the motion judge to refuse the defendants a hearing and then proceed to reach these conclusions was a blatant abuse of his discretion.

III. THE DEMOULAS RESPONDENTS FAIL TO DEMONSTRATE THAT THE MASSACHUSETTS APPEALS COURT'S DECISION RESTED ON ANY INDEPENDENT AND ADEQUATE STATE-LAW GROUND

The Demoulas respondents claim that the Massachusetts Appeals Court's decision rested on independent and adequate State-law grounds, and that review by this Court is thereby precluded. Demoulas respondents' brief, pp. 6-16. This contention should be summarily rejected.

A. The Defendants' Motions for Relief from Judgment Were Not Time-Barred Because the Defendants Were Seeking to Redress a Fraud Upon the Court

A claim of fraud upon the Court is not subject to the one-year limitation period prescribed by Mass R. Civ. P. 60(b), 365 Mass. 828 (1974), for certain categories of motions for relief from judgment. "Rule 60(b) places no time limitation on this ground." *Artco, Inc.* v. *DiFruscia*, 5 Mass. App. Ct. 513, 518, 365 N.E. 2d 832, 836 (1977).

Sahin v. *Sahin*, 435 Mass. 396, 405-406, 758 N.E. 2d 132, 140-141 (2001).

In a futile attempt to show that Judge Lopez's conduct was actually not a fraud upon the Court, the Demoulas respondents quote selectively and misleadingly from Massachusetts decisional law. They would maintain that fraud upon the Court can only occur in the conduct of a *party*. Demoulas respondents' brief, p. 10. However, the common law of Massachusetts recognizes that fraud upon the Court includes fraud committed by the Court itself, by its personnel, or by its officers. *MacDonald* v. *MacDonald*, 407 Mass. 196, 202, 552 N.E. 2d 533, 536 (1990). See *Pina* v. *McGill Development Co.*, 388 Mass. 159, 165, 445 N.E. 2d 1059, 1063 (1983) ("that species of fraud which does, or attempts to, defile the court itself, or is a fraud perpetrated by *officers of the court* so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases that are presented for adjudication") (emphasis supplied), quoted in *Paternity of Cheryl*, 434 Mass. 23, 35-36, 746 N.E. 2d 488, 498 (2001); *Sahin* v. *Sahin*, 435 Mass. 396, 406, 758 N.E. 2d 132, 140-141 (2001). These words describe precisely the conduct that Judge Lopez committed by failing to make timely disclosure of her bias against the defendants.

B. Law-of-the-Case Principles Would Not Be Applied

The Demoulas respondents cannot escape the fact that the Massachusetts courts treat the law-of-the-case doctrine as permissive, not mandatory. *Vittands* v. *Sudduth*, 49 Mass. App. Ct. 401, 414, n.19, 730 N.E. 2d 325, 337 n.19 (2000). See *Potter* v. *John Bean Div. of Food*

Mach. & Chem. Corp., 344 Mass. 420, 427, 182 N.E. 2d 834, 839 (1962) ("The judge was not obliged to apply that doctrine, which was permissive and not mandatory. His was the power to act to the end that a just result be reached"). The doctrine is inapplicable where, as here, new facts bearing on a previously decided issue are brought before the Court. *Conley* v. *United States*, 323 F.3d 7, 13 (1st Cir. 2003). No published Massachusetts decision remotely suggests that the law-of-the-case doctrine would ever be applied to preserve the handiwork of an admittedly biased judge who had thrice sat in judgment of her own challenged conduct.

IV. CONTRARY TO THE RESPONDENTS' CONTENTION, THE PETITIONER DID NOT WAIVE REVIEW OF HER CONSTITUTIONAL CLAIM BY FAILING TO PURSUE THAT CLAIM IN THE LOWER STATE COURTS

In adopting the Code of Judicial Conduct in 1972 as a rule of court, the Supreme Judicial Court sought to implement constitutional values in light of existing precedents. Notable among these were the decisions collected in *King* v. *Grace*, 293 Mass. 244, 200 N.E. 346 (1936), a case in which the Court, by Chief Justice Rugg, stated, "The provisions of our Constitution . . . are at least as rigorous in exacting the standards of judicial propriety as are those of the Fourteenth Amendment to the Constitution of the United States." 293 Mass. at 246, 200 N.E. at 348. In *Lena* v. *Commonwealth*, 369 Mass. 571, 340 N.E. 2d 884 (1976), and *Haddad* v. *Gonzales*, 410 Mass. 855, 576 N.E. 2d 658 (1991), the Court authoritatively construed Canon 3(C)(1)(a) (now 3(E)(1)(a)) of the Code and elaborated upon its provisions by laying down the recusal test that the

petitioner now challenges.[4] In view of these pronouncements by the Commonwealth's highest court, the Appeals Court would neither have altered the recusal test in the present case nor passed upon its constitutionality.

Furthermore, respected commentators acknowledge today that the ultimate rule-making power resides with the Supreme Judicial Court. See Robert J. Brink, The High Energy Years in Court Administration, a Conversation, 84 Mass. L. Rev. 137, 140 (1999). The Legislature, by Mass. Gen. L. c. 211, § 3, has conferred upon the Supreme Judicial Court the exclusive supervisory authority over inferior courts. The Appeals Court thus could not be expected to set aside on constitutional grounds a rule adopted by the Supreme Judicial Court, nor would it consider establishing procedural rules applicable to the lower courts. The inescapable conclusion is that, in the unusual posture of this case, further appellate review (discretionary review) by the Supreme Judicial Court was the only procedural vehicle realistically available to the petitioner for presenting her constitutional claim. The respondents have not shown that the petitioner waived review.

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[4] Although the Appeals Court quoted the *Lena-Haddad* recusal test in *Howe* v. *Prokop*, 21 Mass. App. Ct. 919, 920, 484 N.E. 2d 1029, 1031 (1985), the Court had no occasion to consider its constitutionality. Rather, the Appeals Court merely held that application of the rule that disqualifying bias "must arise from an extrajudicial source" did not abridge the appellant's State and Federal constitutional rights. Compare Demoulas respondents' brief, p. 17; Rafaele Demoulas's brief, p. 4.

V. THE MASSACHUSETTS RECUSAL PROCEDURE DIFFERS FROM THE FEDERAL SCHEME IN SIGNIFICANT RESPECTS

The statutory scheme governing recusal of Federal judges is contained in 28 U.S.C. §§ 144 and 455. The Demoulas respondents are plainly mistaken when they state (Brief, p. 20), relying solely on § 455, that the Massachusetts recusal test must satisfy constitutional requirements because it replicates Federal procedures which have not been subjected to constitutional challenge. Massachusetts does not have the equivalent of the disqualification mechanism afforded to Federal litigants by 28 U.S.C. § 144, which provides, in part:

> "Whenever a party to any proceeding in a district court makes and files a timely affidavit that the judge before whom the matter is pending has a personal bias or prejudice against either him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding."

A party may file only one such affidavit in a case. See *United States* v. *Alabama*, 828 F.2d 1532, 1540 (11th Cir. 1987); Note, Disqualification of Judges for Bias in the Federal Courts, 79 Harv. L. Rev. 1435, 1436-1441 (1966) (each describing the procedures to be followed under § 144). In the unlikely event that a first judge is disqualified under § 144 and a second judge turns out to have an apparent conflict of interest, a litigant must then fall back on § 455. The availability of recusal under § 144 points up a critical difference between Massachusetts practice and that of the Federal system. Massachusetts recusal jurisprudence rests entirely upon self-analysis by the challenged judge. A judge who, as did Judge Lopez, considers

the defendants in a case to be her "enemies" (R. App. at 743) cannot possibly be a fair and impartial judge. Massachusetts recusal practice falls short of fulfilling the due process requirement of "a fair trial in a fair tribunal" contemplated by this Court in *Withrow* v. *Larkin*, 421 U.S. 35, 46 (1975).

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, a writ of certiorari should be granted.

Respectfully submitted,

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